91-1310

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

In the Matter of
THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY

NPM GROUP, INC.
(formerly known as WILMAT HOLDINGS, INC.,
as successor-in-interest to
Central Jersey Industries, Inc.),

Petitioner,

v.

Joseph Benedetto, Richard C. Anglemeyer, John J. Bilsak, Thomas J. Boyle, James A. Briston, Neal L. Brown, Glenn N. Carmitchel, George E. Davis, James C. Douglas, Edward J. Finney, William L. Focht, John A. Hosage, Joseph F. Koetting, Joseph F. Kudlesky, Joseph A. Maraski, Walter E. Marienschek, Charles A. May, Andrew G. Michalow, Walter H. Miller, Roger K. Norman, Frank Parano, Lamar N. Purnell, Louis F. Rauch, John J. Rinehart, Paul E. Sakowski, James J. Schweibinz, George R. Searfoss, Robert I. Searfoss, Dale D. Vogel, John Watto and Consolidated Rail Corporation,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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69

QUESTION PRESENTED

Whether the rule of the Third Circuit that limits tort claims subject to discharge in bankruptcy to causes of action which are accrued for statute of limitations purposes is contrary to the plain language of the pertinent bankruptcy statutes defining a "claim" and frustrates the key objectives in bankruptcy reorganization of finality and fresh start.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Third Circuit were:

1. NPM Group, Inc., a corporation formerly known as Wilmat Holdings, Inc. ("Wilmat") (as successor-in-interest to Central Jersey Industries, Inc. ("CJI"), sued herein as successor to the reorganized Central Railroad of New Jersey ("CNJ")), appellant below and petitioner herein.

2. Thirty individuals (Joseph Benedetto, Richard C. Anglemeyer, John J. Bilsak, Thomas J. Boyle, James A. Bristol, Neal L. Brown, Glenn N. Carmitchel, George E. Davis, James C. Douglas, Edward J. Finney, William L. Focht, John A. Hosage, Joseph F. Koetting, Joseph F. Kudlesky, Joseph A. Maraski, Walter E. Marienschek, Charles A. May, Andrew G. Michalow, Walter H. Miller, Roger K. Norman, Frank Parano, Lamar N. Purnell, Louis F. Rauch, John J. Rinehart, Paul E. Sakowski, James J. Schweibinz, George R. Searfoss, Robert I. Searfoss, Dale D. Vogel, and John Watto), appellees below, who were former employees of CNJ.

3. Consolidated Rail Corporation ("Conrail"), an appellee below and employer of most of the individual appellees named above.

STATEMENT OF CORPORATE RELATIONSHIPS

(Pursuant to Rule 29.1)

Petitioner NPM Group, Inc., a corporation formerly known as Wilmat Holdings, Inc. (successor-in-interest to CJI) has no parent company and no subsidiary companies, except for wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

STATEMENT OF CORPORATE RELATIONSHIPS ... iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

SUMMARY OF REASONS 9

POINT I

THE THIRD CIRCUIT'S RULING PRESENTS AN IMPORTANT QUESTION CONCERNING THE DISCHARGE OF TORT LIABILITIES IN BANKRUPTCY REORGANIZATION WHICH HAS NOT BEEN BUT SHOULD BE RESOLVED BY THIS COURT 10

A. The Third Circuit's Incorporation of Statute of Limitations Accrual Concepts into the Definition of "Claims" Flaunts the Plain Language of the Bankruptcy Statutes 11

B. The Third Circuit's Restrictive Construction of "Claims" Frustrates the Finality and Fresh Start Objectives of Bankruptcy Reorganization 17

C. The Third Circuit's Ruling also Fails to Take into Account Countervailing Equities 21

TABLE OF CONTENTS – Continued

Page

POINT II

THE UNDERLYING RATIONALE OF THE THIRD CIRCUIT'S RULE CONFLICTS WITH THAT OF OTHER CIRCUITS 23

CONCLUSION 28

APPENDIX

Opinion of U.S. Court of Appeals for the Third Circuit, filed December 10, 1991 ..... 1a

Judgment of the Court of Appeals for the Third Circuit, filed December 10, 1991 ..... 16a

Opinion of U.S. District Court for the District of New Jersey, filed March 18, 1991 ..... 18a

Order of U.S. District Court for the District of New Jersey, filed March 18, 1991 ..... 27a

Order No. 965 of U.S. District Court for the District of New Jersey in *In the Matter of the Central Railroad of New Jersey*, filed September 13, 1979 (excerpts) 29a

TABLE OF AUTHORITIES

Page

CASES

A.H. Robins Co., In re, 63 B.R. 986 (Bkcy, E.D.Va. 1986) 26

Amatex, In re, 755 F.2d 1034 (3d Cir. 1985) 17

Baldwin-United Corp., In re, 48 B.R. 901 (Bkcy, S.D. Ohio 1985) 26

Black, In re, 70 B.R. 645 (Bkcy, D.Utah 1986) 26

Chateaugay Corp, In re, 944 F.2d 997 (2d Cir. 1991) 24

Chicago, Rock Island & Pacific R. Co., In re, 756 F.2d 517 (7th Cir. 1985) 19

City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433 (1937) 19

Clinton Centrifuge, Inc., In re, 81 B.R. 844 (Bkcy, E.D.Pa. 1988) 11, 16

DCA Development Corp., In re, 489 F.2d 43 (1st Cir. 1973) 28

Duebler v. Sherneth Corp., 160 F.2d 472 (2d Cir. 1947) 20

Duryee v. Erie Railroad Co., 175 F.2d 58 (6th Cir. 1949), *cert. denied*, 338 U.S. 861 (1949) 19

Edge, In re, 60 B.R. 690 (Bkcy, M.D. Tenn. 1986) 26

Erie Lackawanna Ry. Co., In re, 803 F.2d 881 (6th Cir. 1986) 19

Frenville Co., In re, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1988) 13, 21, 23, 25

TABLE OF AUTHORITIES – Continued

Page

Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir. 1988) 24

Insurance Co. of North America v. Forty Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *adhered to on reh'g*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981) 14, 26

Jensen, In re, 127 B.R. 27 (Bkcy. App. Panel, 9th Cir. 1991) 18, 24, 25

Johns-Manville Corp., In re, 57 B.R. 680 (Bkcy, S.D.N.Y. 1986) 26

Johnson v. Home State Bank, ___ U.S. ___, 111 Sup. Ct. 2150 (1991) 12

Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988) 17

Maynard v. Elliot, 283 U.S. 273 (1931) 19

Mullane v. Central Bank & Trust Co., 339 U.S. 306 (1950) 27, 28

Ohio v. Kovacs, 469 U.S. 274 (1985) 16, 21

Penn Central Transportation Co., In the Matter of, 944 F.2d 164 (3d Cir. 1991), petition for certiorari pending, U.S. Sup. Ct., Oct. T. 1991, No. 91-761 ..... 19, 20, 24

Perez v. Campbell, 402 U.S. 637 (1971) 19

Peyton Realty Corp., In re, 148 F.2d 771 (3d Cir. 1945) 20

Remington Rand Corp., In re, 836 F.2d 825 (3d Cir. 1988) 16, 17, 20

Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir. 1985), *cert. denied*, 474 U.S. 864 (1985) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

THC Financial Corp., In re, 686 F.2d 799 (9th Cir. 1982) 25

UNR Industries, In re, 46 B.R. 671 (N.D.Ill. 1985) 17, 19, 25

UNR Industries, Inc., In the Matter of, 725 F.2d 1111 (7th Cir. 1984) 15

Wyne v. CXS Trans. Co., (E.D.Pa., No. 88-9061, July 31, 1989) WL 89085 7

Zulkowski v. Consolidated Rail Corp., 852 F.2d 73 (3d Cir. 1988), *cert. denied sub nom. Triangle Ind., Inc. v. Zulkowski*, 488 U.S. 994 (1988) 6, 19

CONSTITUTION, STATUTES AND RULES

Constitution

Article I, Sec. 8, cl. 4 27

Statutes

28 U.S.C. § 1254(1) 2

28 U.C.C. § 1291 2

Bankruptcy Act of 1898

Section 77, former U.S.C. § 205 ..... 2, 10, 11, 16, 23

Section 77(b), former 11 U.S.C. § 205(b) 2, 11, 12, 15, 20

Section 77(f), former 11 U.S.C. § 205(f) 3, 11, 17

Federal Employers' Liability Act

Section 1, 45 U.S.C. § 51 3

Section 6, 45 U.S.C. § 56 ..... 4, 8

TABLE OF AUTHORITIES – Continued

Page

Bankruptcy Code

Section 101(4), 11 U.S.C. § 101(4) 12

Section 1129, 11 U.S.C. § 1129 19

Federal Rules of Civil Procedure

Rule 8(c), 28 U.S.C. Rule 8(c) 15

New Jersey Court Rules

Rule 4:5-4 15

LEGISLATIVE HISTORY

S. Rep. No. 482, 73d Cong., 2d Sess. (1934), p. 9 12

H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977), p. 309..... 12

S. Rep. No. 989, 95th Cong., 2nd Sess. (1978), p. 21 12

OTHER AUTHORITIES

Mabey and Jarvis, *In re Frenville: A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions*, 42 Bus. Lawyer 697 (1987) 23

Mirsky, Conway and Humphrey, *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus. Lawyer 623 (1991) 15

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

NPM Group, Inc., successor-in-interest to CII, hereby petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals, filed on December 10, 1991 (Appendix ("App.") *infra*, pp. 1a-15a) is not yet reported. The Opinion of the District Court, filed on March 18, 1991 (App. 18a-26a), is reported in 1991 W.L. 37886.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1991 (App. 16a-17a). This petition is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the Court of Appeals and that of the District Court were based respectively on 28 U.S.C. § 1291 and Section 77 of the Bankruptcy Act of 1898 (former 11 U.S.C. § 205).

STATUTORY PROVISIONS INVOLVED

Section 77(b) of the Bankruptcy Act of 1898, former 11 U.S.C. § 205(b), provides in pertinent part:

> The term "creditors" shall include, for all purposes of this section, and for the purpose only of proceedings relative to the allowance or disallowance of claims, all persons who come within the definition of the term "creditor" in section 1 of this title; and for the purpose only of section 57n of this title, all persons who come within the definition of the term "creditor" in section 1 of this title; . . .
>
> * * *
>
> The term "claims" includes debts, whether liquidated or unliquidated, . . . or other interests of whatever character.

Section 77(f), former 11 U.S.C. § 205(f), of that Act provides in pertinent part:

> Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall . . . be binding upon the debtor, all stockholders thereof, . . . and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it.
>
> * * *
>
> The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may be consistently with the provisions of the plan be reserved in the order confirming the plan.

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, provides in pertinent part:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment * * * * *"

Section 6 of that Act, 45 U.S.C. § 56, which provides a statute of limitations on FELA actions, states in relevant part:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued * * * * *"

STATEMENT OF THE CASE

In 1967 CJI filed a petition for reorganization under Section 77 of the Bankruptcy Act of 1898. By the 1970s, other Northeast railroads were also in reorganization proceedings. Thereafter, a rail crisis, precipitated by a threatened shutdown, led to enactment of the Regional Rail Reorganization Act of 1973 (the "Rail Act"). Pursuant to the Rail Act, on April 1, 1976 CNJ ceased railroad operations. Its rail properties, operations and employees were transferred to Conrail which, under the Rail Act, succeeded to CNJ's rail business along with the rail business of other Northeastern railroads in reorganization.

Over three years later, in September of 1979, CNJ emerged from reorganization as Central Jersey Industries, Inc., a non-railroad company. Prior thereto, the reorganization court had entered its Order No. 965 in aid of consummation of CNJ's amended plan of reorganization. That order discharged all claims against the debtor and enjoined all further proceedings on any such claims. Petitioner herein is a successor-in-interest to the reorganized company, CJI.

Order No. 965 provided, in pertinent part, at ¶ 8 (App. 29a-30a), that:

> . . . the Debtor and the Trustee of the property of the Debtor shall, as of the Consummation Date, be discharged and released forever from
>
> (a) all obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor;

It further provided, at ¶ 22 (App. 29a-31a):

> All persons . . . are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, . . . any suits or proceedings, . . . against the Reorganized Company or its successors or assigns or against any of the assets or property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right,

> claim or interest of any kind or nature whatsoever which any person . . . may have in, to or against the Debtor. . . .

In 1982, FELA actions were commenced against CJI and others seeking damages for injuries allegedly arising out of asbestos exposure occurring prior to CNJ's cessation of rail operations in 1976. The Third Circuit held in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (1985), *cert. denied*, 474 U.S. 864 (1985), that such actions were not barred by Order No. 965 where the injuries were not manifested prior to the entry of that Order. Its reason was that, without such manifested injury, plaintiffs could not have negligence "claims" at that time within the meaning of Section 77.[1]

Since *Schweitzer*, there has been a deluge of FELA actions against CJI and its successors, including but not limited to claims for black lung disease, asbestosis, bronchitis, emphysema, coronary artery disease and hearing loss. In many of the cases discovery has brought out that the employees involved were aware of their alleged injuries prior to entry of the consummation order. Indeed, a number of the plaintiffs concede this to have been the case herein. They assert, however, that they only recently learned that their alleged injuries were caused by their employment at CNJ or that they had rights of action for

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[1] Thereafter, the Third Circuit held in *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73 (1988), *cert. denied sub. nom Triangle Ind., Inc. v. Zulkowski*, 488 U.S. 994 (1988), that CJI was liable for such asbestos-related injuries but declined on jurisdictional grounds to decide whether Conrail would also be liable.

these alleged injuries. Their present actions were instituted in 1988 and 1989.[2] Plaintiff Benedetto, who sued in 1988, says he suffers from a condition diagnosed in 1965 as leukemia which he attributes to exposure to hazardous substances while employed at CNJ when it was an operating railroad. Plaintiffs Anglemeyer and twenty-eight others, who sued in 1989, allege occupational hearing losses caused by their former employment with CNJ.

In response, Wilmat, as successor-in-interest to CJI, moved in the Reorganization Court for enforcement of that court's Order No. 965, seeking an injunction against prosecution of these claims against the reorganized debtor or its successors. Wilmat pointed out that the injuries alleged were manifest prior to Order 965 so as to meet the Third Circuit's requirement in *Schweitzer* for discharge. The District Court, relying on a more recent ruling in the Eastern District of Pennsylvania (*Wyne v. CSX Trans. Co.*, No. 88-9061, July 31, 1989 W.L. 89085), interpreted the *Schweitzer* requirement of an injury manifested pre-reorganization to include plaintiff's knowledge or reason to know of the cause of his injury. (App. 24a-26a). The District Court denied the motion for an injunction in an opinion and order dated March 18, 1991. (App. 27a-28a). The Court of Appeals affirmed. *In the Matter of the Central Railroad Company of New Jersey, Wilmat Holdings, Inc. (as successor-in-interest to Central Jersey Industries, Inc.)*, No. 91-5259, December 10, 1991, not yet reported (App. 1a-15a).

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[2] *Benedetto v. Consolidated Rail Corp., et al.*, N.J. Superior Court (Hudson County), Docket No. W-037345-88; *Anglemeyer, et al. v. Consolidated Rail Corp., et al.*, E.D.Pa., Civil Action No. 89-7056.

Essentially, the Third Circuit adopted the District Court's requirements for a "claim" under the bankruptcy statute. It held that plaintiffs' lack of knowledge, or reason to know, of the causes of their alleged injuries prior to the CNJ reorganization, even though they may have known of the injuries themselves, would prevent them from having accrued FELA causes of action which, it held, is required for the claims to be dischargeable in bankruptcy. To ascertain when such causes of action accrued, the Third Circuit looked to FELA's statute of limitations provision, Section 6, 45 U.S.C. § 56, as interpreted in several cases. The court said, in this regard, that laws regarding accrual of actions for statute of limitations purposes are relevant to the definition of claims cognizant in bankruptcy. (App.15a).

As for the provision in Section 77(b) defining "claims" to include "interests of whatever character," the Third Circuit, quoting from *Schweitzer*, said that there could be no "interest" cognizable as a contingent claim absent a "legal relationship relevant to the purported interest from which that interest may flow;" and, it continued, in tort cases that relationship arises "simultaneously with the cause of action in tort" and not before. (App.13a-14a). The Court of Appeals said nothing about the pre-existing employer-employee relationship which is essential to maintenance of any FELA action. Its approach, the court declared, provided "an appropriate accommodation of the federal interests at play in FELA and in bankruptcy." (App. 14a).

We discuss below why the "accommodation" reached by the Third Circuit clashes with the plain language of the bankruptcy statutes and negates a principal objective

of bankruptcy reorganization, namely, resolution with finality in the bankruptcy reorganization proceeding itself of all types of liabilities of the debtor arising from its pre-reorganization operations so as to afford the rehabilitated enterprise a "fresh start" when released from the statutory proceedings.

REASONS FOR GRANTING THE WRIT

SUMMARY OF REASONS

The ruling below flaunts the plain language of the bankruptcy statutes defining a "claim" in reorganization proceedings. It frustrates Congress' basic goal of successful reorganization by providing, *inter alia*, for finality in the disposition of liabilities stemming from pre-reorganization activities so as to afford the reorganized debtor a fresh start in the future operations of the rehabilitated enterprise. In particular cases it may also inject questions of lack of feasibility of reorganization if the supposedly rehabilitated enterprise cannot be freed from liabilities stemming from its former operations.

In engrafting a judge-made exception from the statutory scheme to protect the interests of injured tort victims who may not have been knowledgeable of their rights prior to finalization of the reorganization, the Third Circuit has failed to take into account countervailing inequities which others may suffer as a result. Moreover, its ruling may encourage debtors to liquidate their enterprises rather than seek to rehabilitate and return them to the stream of commerce where they could provide the

national economy with goods, services and employment opportunities.

The Third Circuit Court of Appeals – which oversees bankruptcy reorganizations in several important industrial and commercial states – has adopted an apparently idiosyncratic rule which conflicts with the view in other Circuits and interferes with the constitutional requirement of uniform rules of bankruptcy throughout the nation. It is therefore particularly important here that the existing disparity in the federal circuits on the question presented be reviewed and resolved by this Court at this time, in order that the dischargeability of various types of tort liabilities in bankruptcy reorganization not be dependent on the circuit in which particular proceedings are conducted.

POINT I

THE THIRD CIRCUIT'S RULING PRESENTS AN IMPORTANT QUESTION CONCERNING THE DISCHARGE OF TORT LIABILITIES IN BANKRUPTCY REORGANIZATION WHICH HAS NOT BEEN BUT SHOULD BE RESOLVED BY THIS COURT

We observe, preliminarily, that while the instant question arises in the context of Section 77 of the former Bankruptcy Act, the thesis of the Third Circuit challenged here applies as well to the matter of the discharge of tort claims under the current Bankruptcy Code. Indeed, as discussed more fully herein, the ruling below builds upon a concept formulated in an earlier Third Circuit case involving the current Bankruptcy Code. Moreover, the Third Circuit has taken into account provisions of the

current Code, as well as that of Section 77(b) of the former Act, in arriving at its ruling herein.[3] Accordingly, the question for which review by this Court is now sought goes beyond construction of the prior statute and is of continuing importance to reorganizations under the present statute.

A. The Third Circuit's Incorporation of Statute of Limitations Accrual Concepts into the Definition of "Claims" Flaunts the Plain Language of the Bankruptcy Statutes

As a railroad, CNJ's reorganization proceedings, instituted prior to the current Bankruptcy Code, were conducted under Section 77 of the former Bankruptcy Act. Section 77(b), former 11 U.S.C. § 205(b), defined "creditors" as holders of "claims of whatever character against the debtor," whether or not they might be "provable claims." The term "claims" was defined to include debts "liquidated or unliquidated" or "other interests of whatever character." Section 77(f), former 11 U.S.C. § 205(b), provided that property transferred to a reorganized debtor pursuant to a reorganization plan "shall be free and clear of all claims of the debtor" and "the debtor shall be discharged from its debts and liabilities" except as may be provided in the confirmed plan. As indicated, "provability" was not a requirement for a claim subject to discharge in a Section 77 reorganization. No

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[3] Third Circuit lower courts have regarded the rationale of *Schweitzer*, carried over below, as applicable to the definition of "claim" in the Bankruptcy Code. *See, e.g., In re Clinton Centrifuge, Inc.*, 81 B.R. 844, 847, n.4 (Bkcy, E.D.Pa. 1988).

distinction was drawn between claims founded in tort and those founded upon contract or otherwise.

A comparably broad concept appears in the current Bankruptcy Code which likewise draws no distinction between tort and other claims. Section 101(4) defines "claims" to include, *inter alia*, a "right to payment, whether or not such right is . . . liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable. . . . " 11 U.S.C. § 101(4). The legislative history of the current Code is clear that Congress intended the concept of "claim" to be very broad. The House Report stated that it was contemplated that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977), p. 309. The Senate Report called it the "broadest possible definition." S. Rep. No. 989, 95th Cong., 2d Sess. (1978), p. 21. *See also Johnson v. Home State Bank*, ___ U.S. ___, 111 Sup. Ct. 2150, 2151 (1991) ("broadest available definition of claim"). As noted, former Section 77(b)'s definition was comparably broad, including *inter alia* liability "interests of whatever character."[4]

The Third Circuit's decision to incorporate accrual concepts based on discovery considerations, deemed appropriate to the running of the statute of limitations, into the definition of a "claim" for bankruptcy purposes

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[4] The Senate Report stated, as respects Section 77(b): " . . . the plan when confirmed and carried out will set forth the capitalization of the reorganized company and there must be no uncertainty as to its finality." S. Rep. No. 482, 73d Cong., 2d Sess., 9 (1934).

cannot be reconciled with the pertinent statutory language. The decision is an outgrowth of recent rulings of the Third Circuit commencing with *In re Frenville Co.*, 744 F.2d 332 (1984), *cert. denied*, 469 U.S. 1160 (1988). That case involved an action for indemnification against a debtor in proceedings under Chapter 7 of the Bankruptcy Code. The question was whether the lawsuit was barred by the Code's automatic stay of actions on pre-petition claims. Focusing on the phrase "right to payment" in the Code's definition of a claim, the Third Circuit ruled that since plaintiff had no such right until it satisfied a judgment against the debtor, which it had not done pre-petition, its claim was post-petition and therefore not subject to the automatic stay. We show below (Point II) that *Frenville's* thesis as to the necessity of a ripened cause of action to constitute a "claim" for bankruptcy purposes has been rejected by appellate courts in the Second, Fourth and Ninth Circuits, by lower courts in other circuits, and has been questioned by the Seventh Circuit. However, in *Schweitzer, supra*, the Third Circuit relied on *Frenville*. As noted, *Schweitzer* involved asbestos-related FELA personal injury actions brought, *inter alia*, by former employees of CNJ when it was an operating railroad. They alleged exposure to asbestos during their employments many years earlier asserting, however, that their injuries had not become manifest until after CNJ had been reorganized. As indicated, the Third Circuit ruled that there could be no "claim" subject to discharge until there was manifest injury because such injury was essential to a tort cause of action for negligence. Since allegedly no injury had manifested itself prior to the reorganization, plaintiffs were held to have had no claims

which could have been discharged. Seemingly implicit in the Third Circuit's earlier ruling in *Schweitzer* is the thesis that there can be no contingent liability in tort, in contrast to contingent liabilities in contract or under other legal concepts, so as to bring into play statutory provisions encompassing contingent liabilities.

In the cases at bar alleged injuries had, in fact, manifested themselves prior to the reorganization. Under *Schweitzer*, that should have been sufficient to establish "claim" status for bankruptcy purposes. The Third Circuit, however, added another requirement, *viz.*, that the alleged victim knew, or had reason to know, that his employment with the defendant was the source of his injury. As indicated, in arriving at this conclusion, the Circuit Court relied on discovery considerations deemed relevant in applying statutes of limitations.

In so doing, the Third Circuit misconceived a tortfeasor's liability for negligence when it focused upon the alleged victim's knowledge, or reason to know, of the cause of his injury rather than upon the tortfeasor's wrongful conduct and the resulting injury. This is because it is the wrongful injury and not the plaintiff's knowledge of its cause which is the basis for the right to sue for negligence. *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1220 (6th Cir. 1980), *adhered to on reh'g*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981). The Third Circuit has thus gone beyond the ordinary concept of when actionable liability for negligence may be incurred. This is apart from the statutory provisions which, as discussed herein, make it clear that a "claim"

for bankruptcy purposes may precede actionable liability.[5]

Section 77(b) provided for the discharge of the reorganized debtor from his "liabilities." A tort victim's failure to discover the cause of his injury, depending on the circumstances, may be relevant to the matter of tolling the statute of limitations in an action for the injury. It is not relevant, however, to the question whether the debtor has incurred some form of liability for misconduct or whether a cause of action for resulting injury comes into being prior to that discovery. Accordingly, lack of such discovery cannot govern the question whether the tort victim had any liability "interest" in the debtor's estate prior to finalization of the reorganization.

It is pertinent to point out also that the statute of limitations is but an affirmative defense which must be pleaded. Federal Rules of Civil Procedure, Rule 8(c); N.J. Court Rule 4:5-4. The defense may be waived; and in such case suit may be maintained on the cause of action irrespective of the statute of limitations. Accordingly, lack of discovery by the victim of the cause of his injury, if relevant to the tolling of the period of limitations, does not mean that a cause of action did not exist without it. On the contrary, as noted by the Seventh Circuit in *In the Matter of UNR Industries, Inc.*, 725 F.2d 1111, 1119 (1984),

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[5] See also Mirsky, Conway and Humphrey, *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus. Lawyer 623, 651 (1991), observing that, the Third Circuit excepted, "courts have focused on the time when the conduct giving rise to the claim occurred in order to determine when a claim arises."

"Even in a 'discovery' state the cause of action may 'exist' before it accrues – that is, before the statute of limitations on bringing it begins to run."[6]

The Third Circuit's analysis cannot be reconciled with the governing statutory language. There is no reason to assume that Congress misconceived the distinction between liability for tortious misconduct and the victim's knowledge of the tort and its source which may be required for the running of the statute of limitations. Congress defined a "claim" in broadly inclusive terms – such as "interests of whatever character," "whether or not . . . provable . . . ", under Section 77, and "right to payment, whether or not such right is . . . liquidated, unliquidated, fixed, contingent, matured, unmatured . . . ", under the Bankruptcy Code. It drew no definitional distinction in either statute between claims founded in tort and those founded upon contract or other concepts. As this Court stated in *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985), *"Congress desired a broad definition of a 'claim' and knew how to limit the application of a provision to contracts when it desired to do so."* The Third Circuit apparently has made a distinction which Congress has not made. It is of interest that in *In re Remington Rand*

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[6] This appears also to have been the view of lower courts in the Third Circuit prior to the Circuit Court's ruling herein, at least as respects claims based on contract. *See, e.g., In re Clinton Centrifuge, Inc., supra* at 849, stating:

> "The fact that a limitations period is tolled pre-petition does not negate the existence of the claim pre-petition. To hold otherwise would permit an event which tolls a statute of limitations to convert a pre-petition claim into a post-petition claim."

Corp., 836 F.2d 825 (1988), the Third Circuit considered *subject to discharge a clai*m based on breach of contract, *characterizing it as "conti*ngent and unliquidated" prior *to confirmation of the plan*. *Id.*, at 827, 833. In such a case, it said, it was willing to "r*e*cognize that a party may have a bankruptcy claim and n*o*t possess a cause of action on that claim." *Id.*, pp. 831-2. The statute, however, does not support this distinction be*t*ween contract and tort based claims, let alone the Third Circuit's restrictive interpretation with respect to the l*a*tter.[7]

B. The Third Circuit's Restrictive Construction of "Claims" Frustrates the Finality and Fresh Start Objectives of Bankruptcy Reorganization.

Section 77(f) expressly sets forth the statute's objec*tive to transfer property of* the debtor to the reorganized

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[7] *It may be observed,* also, that were the Third Circuit *correct in its thesis that no* cause of action, and indeed no *liability "interest" whatsoever* of a tort victim, can exist prior *to the victim's knowledge of* his injury and its cause, there *would seemingly be little or* no basis for the actions taken in *the Johns-Manville and other* cases in which special reserves *have been provided in reor*ganization plans for victims of asbestos related and other injuries which may not have manifested themselves at the time of the reorganization proceedings but in which legal representatives have been appointed to protect the interests of such yet unknown victims. *See, e.g., Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re UNR Industries*, 46 B.R. 671 (N.D. Ill. 1985). *See also In re Amatex*, 755 F.2d 1034 (1985) in which the Third Circuit itself ruled that latent victims of asbestosis, unidentified at the time of the reorganization, possessed sufficient interests to warrant representation in the reorganization proceeding.

company "free and clear of all claims of the debtor." Provision of a "fresh start" for a reorganized debtor continues to be "the overriding goal of the Bankruptcy Code." *In re Jensen*, 127 B.R. 27, 31 (Bkcy App. Panel, 9th Cir. 1991).

"Fresh start" is not a hollow slogan. It is, rather, a short expression of the goal of federal bankruptcy reorganization to preserve failed or failing business enterprises whenever feasible – to rehabilitate and put them back into the national economy free from the accumulated financial burdens which otherwise would require their liquidation and removal from the stream of commerce and industry in this country. It is in the national interest that business enterprises, and the goods, services and jobs they produce, shall survive and function whenever possible. It is this interest which "fresh start" is intended to further and that which is regarded as an important, indeed "overriding", objective of federal bankruptcy reorganization. Regretfully, that goal will be frustrated by the Third Circuit's ruling herein. To the extent that the Third Circuit's rule deprives a reorganized debtor of freedom from liabilities emanating from its past operations, its incentive to utilize the bankruptcy law for the purpose of rehabilitating its business for continued operations may be severely impaired or even destroyed – at least in the Third Circuit. The Third Circuit's rule, in particular instances, may hamper formulation of any reorganization plan, if indeed it does not prevent one by creating a serious question as to the feasibility of any reorganization if the debtor is not to be freed from continuing liabilities stemming from past operations. This is because it is a prerequisite for confirmation of a plan of

reorganization that reorganization "is not likely to be followed by . . . liquidation, or the need for further financial reorganization," unless provided in the plan itself. Bankruptcy Code, § 1129, 11 U.S.C. § 1129. Thus, in *In re UNR Industries, supra,* the Seventh Circuit observed that if claims for asbestosis cannot be discharged before they develop into ripened causes of action, the debtor "may not be able to emerge from bankruptcy with reasonable prospects for continued existence as a going concern." (725 F.2d, at 1119). Liquidation, if that should result, would leave post-bankruptcy plaintiffs, such as those here, with no one to pursue.[8]

In numerous cases, this Court and other federal courts have stressed the goal of finality in the reorganization proceedings and a fresh start for the reorganized enterprise. *See, e.g., Perez v. Campbell,* 402 U.S. 637, 648 (1971); *City Bank Farmers Trust Co. v. Irving Trust Co., et al.,* 299 U.S. 433, 438-39 (1937); *Maynard v. Elliot,* 283 U.S. 273, 277 (1931); *In re Chicago, Rock Island & Pacific R. Co.,* 756 F.2d 517, 523 (7th Cir. 1985); *Duryee v. Erie Railroad Co.,*

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[8] In *In the Matter of Penn Central Transportation Co.,* 944 F.2d 164 (1991), *petition for certiorari pending,* U.S. Sup. Ct., Oct. T. 1991, No. 91-761, the Third Circuit distinguished *In re Erie Lackawanna Ry. Co.,* 803 F.2d 881 (1986) in which the Sixth Circuit had upheld an injunction against a post-reorganization lawsuit instituted by a former railroad employee on an alleged asbestos-related injury. The Third Circuit said that *Erie* really involved a liquidation, so that there was no reorganized debtor to sue. Erie Lackawanna Railway Co. had transferred the bulk of its rail properties to Conrail and had ceased rail operations. In the instant case, CNJ transferred all of its rail properties to Conrail. However, in *Zulkowski, supra,* the Third Circuit ruled that CNJ had been reorganized and not liquidated.

175 F.2d 58, 63 (6th Cir. 1949), *cert. denied*, 338 U.S. 861 (1949); *Duebler v. Sherneth Corp.*, 160 F.2d 472, 473-74 (2d Cir. 1947). While this fundamental objective would be frustrated by the Third Circuit's ruling herein, it has been recognized by that Court of Appeals itself. *See, e.g., In re Peyton Realty Corp.*, 148 F.2d 771, 773 (1945). Even in *Schweitzer*, upon which the instant ruling builds, the Third Circuit acknowledged that Section 77(b) –

> " . . . clearly provides broad authorization for the discharge in bankruptcy of claims against the debtor in order to secure a fresh start for a company resulting from a Section 77 reorganization." (758 F.2d, at 941).[9]

The Third Circuit has now chosen to subordinate this key Congressional objective to avoid inequities to victims of latent injuries. To this end, it has carved out an exception to the mandate of the bankruptcy law by formulating a highly restrictive concept of what are "claims" subject to the discharge provisions of that law. As discussed, that concept is untenable. Moreover, it may engender serious countervailing inequities, a matter to which we now turn.

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[9] In *In re Remington Rand Corp., supra*, 836 F.2d at 833, the Third Circuit likewise stressed the importance of "finality" in bankruptcy proceedings in a case involving pre-reorganization contingent contract claims. *See also In the Matter of Penn Central Transportation Co., supra*, 944 F.2d at 166-7, and other Third Circuit cases cited therein.

C. The Third Circuit's Ruling Also Fails To Take Into Account Countervailing Equities

As discussed, the Third Circuit focuses on the perceived inequity of denying a tort victim the right to seek recovery for an injury of whose cause he may not have known, or have had reason to know. This is an understandable concern, although no consideration appears to have been given to the employee's right here to have sought equitable or other relief, at the time of his employment, from an unsafe or hazardous working environment.[10]

We do not gainsay that the statutory scheme, on occasion, may produce certain inequities. This is inherent in *in rem* proceedings; and bankruptcy is one of them. *In rem* proceedings, which are designed to promote the stability of commercial transactions by quieting title to assets to be transferred, frequently fail to satisfy various claims. This, of course, is always the case when the assets in the proceeding are insufficient. Inequities, in whatever context they might arise, should be minimized whenever this can be done without disregarding fundamental and overriding objectives of the particular proceedings – here bankruptcy reorganization. In particular instances, such disregard may bring about serious countervailing inequities.

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[10] In *Frenville* and *Schweitzer*, the Third Circuit indicated that, when equitable relief is available, a claim may exist for bankruptcy purposes. See *Schweitzer* 758 F.2d at 943, citing *Frenville*. *Cf. Ohio v. Kovacs, supra*, 496 U.S. at 278-9.

Thus, since bankruptcy proceedings generally involve estates insufficient to satisfy all of the debtor's liabilities, some or many of these liabilities may have to be compromised or even left wholly unsatisfied. Although it may not have occurred in the CNJ reorganization, in other reorganizations FELA claimants could wind up recovering only a portion of their claims, or possibly nothing. Accordingly, to afford them the opportunity to recover all of their claims post-reorganization may afford them unwarranted preferential treatment in particular cases. Such treatment, moreover, may be at the expense of those whose interests in the reorganized enterprise stemmed from claims which had been compromised in large part in the reorganization. It might also be at the expense of new investors who have bought into the reorganized enterprise on the reasonable belief that it was free of liabilities engendered in the debtor's former operations. Countervailing inequities, such as these, do not appear to have been taken into account by the Third Circuit.

These considerations, which reflect adversely upon the Third Circuit's rule, are in addition to the frustration of the finality and fresh start objectives of bankruptcy reorganization which, as discussed, may seriously diminish a debtor's interest in reorganization as an alternative to liquidation and, in particular cases, may prevent even a desired reorganization for lack of feasibility.

POINT II

THE UNDERLYING RATIONALE OF THE THIRD CIRCUIT'S RULE CONFLICTS WITH THAT OF OTHER CIRCUITS

As indicated, the ruling below is predicated upon a rationale of what constitutes a "claim" in bankruptcy developed by the Third Circuit in earlier cases. Thus, in *Frenville* the Third Circuit decided that the phrase "right to payment" in the Bankruptcy Code's definition of "claim" meant that there must be an accrued cause of action upon which suit may be brought. In *Schweitzer*, involving Section 77 of the former Act whose definition encompassed "interests of whatever character," the Third Circuit said that this required a "legal relationship relevant to the purported interest from which that interest may flow" (citing *Frenville*); and it ruled that, in the case of a negligence claim, that relationship comes into being with manifestation of an injury. 758 F.2d, at 943. The ruling below now requires, additionally, that the alleged victim know, or have reason to know, of the source of his injury.

The Third Circuit's basic thesis of equating a "claim" for bankruptcy purposes to an accrued cause of action has been rejected by various commentators and by courts in several other circuits. Thus, the National Bankruptcy Conference is on record as believing it is wrong. *See* Mabey and Jarvis, *In re Frenville: A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions*, 42 Bus. Lawyer 697 (1987); Mirsky, Conway and Humphrey, *supra*, at p. 652 (" . . . most courts do not equate when a claim arises with the accrual of a cause of action.")

In *Grady v. A.H. Robins Co.*, 839 F.2d 198 (1988), which involved the applicability of the automatic stay provision of the Bankruptcy Code to an action based on toxic tort, the Fourth Circuit rejected the proposition that the claim was not pre-petition because the harm alleged did not manifest itself until after the bankruptcy petition. The Fourth Circuit ruled that the claim arose when the product was used, which was pre-petition. The court declined to follow the *Frenville* thesis, observing that it was peculiar to the Third Circuit.

In *In re Chateaugay Corp.*, 944 F.2d 997 (1991), the Second Circuit affirmed a District Court ruling that claims in a Chapter 11 reorganization under the Bankruptcy Code included environmental claims based on pre-petition releases of hazardous substances even though the clean-up costs sought to be recovered were incurred later. The government relied unsuccessfully on *Schweitzer*. Shortly thereafter, the Third Circuit reached an opposite conclusion in *In re Penn Central Transportation Co., supra*, based on *Schweitzer* which it described as providing an "exception to finality" in bankruptcy reorganization. 944 F.2d, at 167.

The Third Circuit's ruling below conflicts also with the view of the Ninth Circuit, as recently expressed by that Circuit's Appellate Bankruptcy Panel in *In re Jensen*, 127 B.R. 27 (1991). That case involved the question whether a government claim for hazardous waste clean up costs had been discharged in proceedings under the Bankruptcy Code. The appellate panel held that it had been. The court emphasized that the definition of "claims" for bankruptcy purposes required broad interpretion in light of the "overriding goal of the Bankruptcy

Code to provide a 'fresh start' for the debtor." (*Id.*, at 31). The legislative history, the court pointed out, made clear the intention of Congress that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." (*Id.*, at 29). The court rejected the *Frenville* thesis, referring *inter alia* to cases in other circuits which had also expressly done so or whose rulings were in conflict with the Third Circuit's view. (*Id.*, pp. 30-32). The Appellate Bankruptcy Panel said that a "claim", for bankruptcy purposes, comes into existence when the wrongful conduct of the debtor which gives rise to the alleged liability occurs and not when subsequent events enable a claimant to institute a lawsuit.[11]

While the Seventh Circuit has not yet made a definitive ruling, its opinion in *In re UNR Industries, supra,* also indicates dissatisfaction with the rationale of the Third Circuit. It rejects the notion that accrual of a cause of action for statute of limitations purposes negates the prior existence of a "cause of action;" and it suggests that those who suffered injury prior to reorganization may have claims which are dischargeable. 725 F.2d, at 1119.

In *Jensen, supra,* the Ninth Circuit's Bankruptcy Appellate Panel referred with approval to the views

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[11] *See also In re THC Financial Corp.*, 686 F.2d 799 (9th Cir. 1982), recognizing an indemnification claim as contingent and subject to the automatic stay provision of the Code, even though it did not mature until after the petition. The Ninth Circuit referred, *inter alia,* to "the policy of the Bankruptcy Act promoting disposition of as many claims against the debtor as possible, and the power of the court to . . . estimate claims." *Id.*, at 803.

expressed in *In re Edge*, 60 B.R. 690 (Bkcy, M.D. Tenn. 1986). In *Edge* the court rejected the notion that one should look to the applicable statute of limitations to ascertain when a claim arose for bankruptcy purposes. (*Id.*, at 697). According to *Edge* (*Id.*, at 704), "*Schweitzer* and *Frenville* confuse the existence of a present right of action or access to the courts with the existence of a 'claim' for bankruptcy purposes." *Edge* also took issue with the proposition of the Third Circuit that there can be no legal relationship between a tortfeasor and his victim until an actionable tort accrues, stating that a relationship comes into being at the time of the defendant's tortious misconduct at which time the victim acquires an "interest" in the negligent party. *Id.*, at 705.

The Third Circuit's rationale conflicts also with lower court rulings in other circuits – *see, e.g., In re A.H. Robins Co.*, 63 B.R. 986 (Bkcy, E.D.Va. 1986); *In re Black*, 70 B.R. 645 (Bkcy, D.Utah 1986); *In re Johns-Manville Corp.*, 57 B.R. 680 (Bkcy, S.D.N.Y. 1986); *In re Baldwin-United Corp.*, 48 B.R. 901 (Bkcy, S.D. Ohio 1985). It is also in conflict with the Sixth Circuit as respects incurrence of tort liability for negligence, as evidenced by *Insurance Company of North America v. Forty-Eight Insulations, Inc., supra*, which rejects a discovery test used for purposes of tolling a statute of limitations. (633 F.2d, at 1120). *See also In re Edge, supra*, at 700, applying *Forty-Eight Insulations* as respects a "claim" under the Bankruptcy Code.

It is important as a general matter that there be consistency in the various circuits as regards the interpretation and administration of particular federal statutes. This is especially true in the case of the bankruptcy law in light of the provision of the Constitution which

calls for the establishment of "uniform laws on the subject of Bankruptcy throughout the United States." Article I, Section 8, Clause 4. Effectuation of that constitutional provision requires that whether or not certain "claims" exist for purposes of the nation's bankruptcy law should not depend on the circuit in which the particular proceeding takes place. We submit that the Third Circuit's highly restrictive view of what is a claim subject to discharge in bankruptcy reorganization, particularly in light of its conflict with the view of other circuits, should be examined by this Court at this time and the existing disparity resolved. While the Third Circuit's position appears to be unique among the several circuits which have had occasion to consider the matter, its unduly restrictive view is presently the law in several important commercial and industrial states.[12]

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[12] We note, in passing, the Third Circuit's observation that its ruling avoids a serious constitutional question if claims of tort victims, of which they had "no effective awareness", were permitted to be discharged. (App. 15a). Apart from its lack of merit, the question is gratuitous here since plaintiffs were aware of their injuries prior to the reorganization consummation order. The court had no occasion to rule upon it and did not do so. Accordingly, it is not a question presented by this petition.

Without a search of voluminous old records, we are unable to state whether plaintiffs were sent personal notices of the reorganization proceedings and its proof of claim requirements. To the extent that they were not "known creditors", extensive notice was given by publication in accordance with orders of the reorganization court. This satisfied constitutional requirements. *Mullane v. Central Bank & Trust Co.*, 339 U.S. 306

(Continued on following page)

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: February 11, 1992

(Continued from previous page)

(1950). Moreover, plaintiffs were aware of the reorganization proceedings through their continuous involvement with the railroad – individually and through union representatives. More fundamentally, publication notice in an *in rem* proceeding such as this suffices to bar future contingent or remote claimants whose identities are not known nor reasonably ascertainable. *Mullane*, 339 U.S., at 318-20; *In re DCA Development Corp.*, 489 F.2d 43, 47 (1st Cir. 1973).

APPENDIX

Filed December 10, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5259

IN THE MATTER OF:

THE CENTRAL RAILROAD COMPANY OF
NEW JERSEY

WILMAT HOLDINGS, INC.,
(as successor-in-interest to
Central Jersey Industries, Inc.) ("Wilmat")

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 67-00401)
Argued August 13, 1991

Before: COWEN and NYGAARD,
Circuit Judges, and
POLLAK, District Judge*

(Filed: December 10, 1991)

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

POLLAK, District Judge.

Introductory Statement

In order properly to understand the problem now before this court, it may be helpful to take a brief retrospective look at events now well in the past.

On March 12, 1967 – almost a quarter of a century ago – the Central Railroad of New Jersey (CNJ), following the well-blazed path of many another financially ailing railroad, filed a bankruptcy petition in the District Court for the District of New Jersey. Nine years into the reorganization process – on April 1, 1976 – CNJ's rail assets were conveyed to Conrail. And over three years later – on September 14, 1979 – CNJ emerged from reorganization as a non-railroad enterprise called Central Jersey Industries (CJI). The launching of CJI followed by one day the entry by the district court of Order 969 denominated an "Order in Aid of Consummation of Amended Plaintiff's Reorganization of the Central Railroad of New Jersey." Paragraph 22 of Order 965 reads, in pertinent part:

> All persons . . . are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing . . . any suits or proceedings . . . against the Reorganization Company or its successors or assigns or against any of the assets or property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any person . . . may have in, to, or against the Debtor. . . .

Some years after the consummation of the CNJ reorganization, numerous asbestos-related FELA suits were brought against CNJ and CJI in federal and state courts. These suits sought compensation for sickness allegedly caused by asbestos exposure during the course of employment before the CNJ ceased operations. Concurrently, similar suits were brought by former employees of the bankrupt Reading Railroad, which, after turning its rail assets over to Conrail in 1976, had in 1980 emerged from reorganization proceedings in the District Court for the Eastern District of Pennsylvania as a non-railroad. The defendants in these various suits contended that suits arising out of the operations of the two reorganized railroads were barred by Section 77(f) of the then-governing Bankruptcy Act, former 11 U.S.C. § 205(f), which specified, in relevant part, that:

> The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and

> creditors, and the debtor shall be discharged from its debts and liabilities . . .

The District Court for New Jersey agreed with defendants that the plaintiffs' suits were "claims" that had been "discharged" and, in reliance on the protective authority spelled out in Order 965, enjoined the prosecution of the FELA suits against CNJ and CJI. The District Court for the Eastern District of Pennsylvania reached the same result with respect to the suits against the Reading.

The enjoined plaintiffs – together with Conrail, which had intervened to oppose the CNJ-CJI-Reading position – appealed the determinations of the two district courts. In *Schweitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936 (3d Cir.), *cert. denied sub nom Reading Co. v. Schweitzer*, 474 U.S. 864 (1985), this court, through Judge Seitz, reversed.

This court began its analysis in *Schweitzer* by setting forth the relevant language of former Section 77(f), and then observed (*id.* at 941):

> The quoted statutory language clearly provides broad authorization for the discharge in bankruptcy of claims against the debtor in order to secure a fresh start for a company resulting from a section 77 reorganization. It is equally clear that plaintiffs' rights only could have been affected by the discharge of all "claims" against their employer if they had "claims" within the meaning of section 77 prior to the consummation date of their employer's reorganization.

Next, this court determined that whether the FELA causes of action at issue in *Schweitzer* were dischargeable "claims" within the meaning of former Section 77(f) depended on whether, as a matter of FELA law, those

causes of action "existed" as of the date of the consummation of the reorganization. *Ibid.* Building on the Supreme Court decision in *Urie v. Thompson*, 337 U.S. 163 (1949) (silicosis compensable under FELA; three-year statute of limitation starts running as of date " 'effects of the deleterious substance manifest themselves,' " 337 U.S. at 170) and also on general principles of tort law as explicated by Deans Prosser and Keeton (758 F.2d at 941-42), this court then held "that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury." *Id.* at 942.

In explaining why the contentions of the defunct railroads and their successors-in-interest were unpersuasive, this court observed (*ibid.*):

> It is true that the possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to a histologist. *See Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1218 (6th Cir. 1980), *clarified* 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981). Likewise, the existence of such injury may be of vital concern to insurers and their insureds who have bargained for liability coverage triggered by "bodily injury." *See id.* We believe, however, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.
>
> Moreover, we are persuaded that a contrary rule would be undesirable as applied in the asbestos-related tort context. If mere exposure to

asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered.

The Present Litigation

The present litigation commenced as an application filed in the District Court for the District of New Jersey in December of 1990. The application, submitted by Wilmat Holdings, Inc. (Wilmat) as successor-in-interest to CJI, invoked former Section 77 and Order 965, and sought the issuance of a decree enjoining the continued prosecution, "against Central Jersey Industries, Inc. or any of its successors in interest," of three lawsuits. All three were suits arising under FELA. In one of them – *Benedetto v. Consolidated Rail Corp. et al.*, Docket No. W-037345-88, pending in the New Jersey Superior court for Hudson County – the plaintiff had alleged that he had contracted leukemia as a result of exposure to certain toxic substances while working for the railroad. In the two other suits – *Anglemeyer, et al. v. Consolidated Rail Corp.*, Civ. No. 89-7056, and *Delay, et al. v. Consolidated Rail Corp.*, Civ. No. 89-7058, both pending in the District court for the Eastern District of

Pennsylvania – thirty-three plaintiffs had alleged loss of hearing traceable to their employment on the railroad.

In asking that the pending FELA cases be halted, Wilmat asserted that Mr. Benedetto's leukemia was diagnosed in 1965, fourteen years before the September 13, 1979 consummation of the CNJ reorganization, and, similarly, that all, or most, of the hearing-loss plaintiffs had known of their hearing difficulties before September 13, 1979. Accordingly, so Wilmat argued, the ailments of these plaintiffs were, within the intendment of *Schweitzer*, "manifest" before Order 965 was filed, and hence any claims predicated on those ailments were barred.

Judge Fisher, in the District Court for the District of New Jersey, denied the requested injunction. Judge Fisher concluded that Judge Waldman, in *Wyne v. CSX Trans. Co.*, Civ. Action No. 88-9061 (E.D.Pa., July 31, 1989), 1989 WL 89085, at 3, had correctly stated the law: "[B]efore a tort claimant's injuries may be deemed 'manifest' and thus constitute a claim under *Schweitzer* the claimant must know or have reason to know of his condition and the cause thereof." Judge Fisher determined that, on the record before him, it could not be determined as a matter of law that, at some time prior to September 13, 1979, Mr. Benedetto or any of the hearing-loss plaintiffs had "know[n] or [had] reason to know of his condition and the cause thereof." Judge Fisher intimated that, instead of pursuing equitable relief in his court, Wilmat would do better to develop a fuller evidentiary record as to each

plaintiff with a review to moving for summary judgment in the courts in which the FELA actions were pending.[1]

Wilmat has appealed to this court from the district court's denial of injunctive relief.[2]

Discussion

Determining the date on which a non-traumatic injury becomes an enforceable claim can be a matter of some complexity. Thus, when the Supreme Court, in 1949, determined that silicosis – an occupational disease – was an "injury" compensable under FELA, the Court also was required to address the defendant's argument that the plaintiff, a fireman on the Missouri Pacific for some thirty years, "having been exposed to silica dust since approximately 1910, must unwittingly have contracted silicosis long before 1938, and hence that has 'cause of action' must be deemed to have 'accrued' longer than three years before the institution of this action [in 1941]." *Urie v. Thompson*, 337 U.S. 163, 169 (1949). The Court in *Urie*, speaking through Justice Rutledge, rejected the defendant's argument (*id.* at 169-70):

> If Urie were held barred from prosecuting this action because he must be said, as a matter

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[1] We are advised that, subsequent to Judge Fisher's ruling, the claims of the four *Delay* plaintiffs have been dismissed with prejudice. *Brief for Appellees Richard C. Anglemeyer, et al.*, p. 3 n.4.

[2] Conrail, a defendant and cross-claimant in the FELA suits Wilmat seeks to halt, appeared in the district court in opposition to Wilmat's prayer for injunctive relief; Conrail also filed a brief on appeal and participated in the argument.

of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Nor can we accept the theory that each intake of dusty breath is a fresh "cause of action." In the present case, for example, application of such a rule would, arguably, limit petitioner's damages to that aggravation of his progressive injury traceable to the last eighteen months of his employment. Moreover petitioner would have been wholly barred from suit had he left the railroad, or merely been transferred to work involving no exposure to silica dust, more than three years before discovering the disease with which he was afflicted.

We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was

> accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves. . . . " *Associated Indemnity Corp. v. Industrial Accident Commission*, 124 Cal. App. 378, 381.

Thus, actual awareness, or notice, that one has an occupational disease is a necessary condition for commencing the running of the limitation period. But it may not be a sufficient condition. This court held in *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356, 358 (3d Cir. 1986):

> Under *Urie*'s rationale, when an occupational illness is the basis for the claim under FELA, the statute of limitations begins to run when the employee becomes aware of his disease and its cause.

Judge Waldman in *Wyne* and Judge Fisher in the present case looked to *Urie* and *Kichline* for guidance on when, within the intendment of *Schweitzer*, an FELA claim is "manifest." As Judge Fisher put it, "the claim is not manifest until the party discovers his injury *and the cause thereof* . . . " (emphasis in original).[3]

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[3] Judge Waldman stated in *Wyne*: "Under the F.E.L.A., a plaintiff's claim does not accrue until the plaintiff knows, or should have known of his condition and its cause." *Wyne v. CSX Trans. Co., supra*, 1989 WL 89085, at 2.

Appellant Wilmat argues that it is incorrect to read into *Schweitzer*'s use of the term "manifestation" ("F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury" 758 F.2d at 941) the duality of what is to be discovered – "injury and *the cause thereof*" – called for by Judge Fisher. It is true that neither this court's opinion in *Schweitzer*, nor this court's subsequent opinion in *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73 (3d Cir.), *cert. denied sub nom., Triangle Ind., Inc. v. Zulkowski*, 488 U.S. 994 (1988) (CJI, as successor to CNJ, not relieved of FELA liability by virtue of transfer of CNJ's rail assets to Conrail), unpacked the word "manifestation" to expose both the ingredients whose discovery spells accrual of the FELA cause of action. But no issue presented in *Schweitzer*, or in *Zulkowski*, required this court to explore the content of "manifestation" in that detail. What is significant is that in *Kichline* – decided between *Schweitzer* and *Zulkowski* – this court was called on to specify the moment of accrual of an FELA claim when the claimant actually is aware of his injury. *Kichline* expressly determined that moment to be "when the employee becomes aware of his disease and its cause." 800 F.2d at 358. That determination remains controlling authority in this Circuit as to the accrual of causes of action arising under FELA.[4]

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[4] The First, Fourth and Fifth Circuits have addressed the same issue with respect to the accrual of FELA claims and reached the same conclusion. *See Albert v. Maine Cent. R. Co.*, 905 F.2d 541, 543-44 (1st Cir. 1990) and cases cited therein. As to cases arising under the Federal Tort Claims Act, *see United States v. Kubrick*, 444 U.S. 111 (1979), and *Stoleson v. United*

(Continued on following page)

Wilmat also argues that, for the purpose of determining the dischargeability of claims pursuant to CNJ's consummated reorganization, concepts of FELA claim accrual addressed to the running of the statute of limitations are not pertinent. According to Wilmat, plaintiffs had claims cognizable in the CNJ reorganization at least as soon as they knew they were injured without regard to whether they knew the cause of such injury. We recognize that the bifurcation contended for by Wilmat is a conceptual possibility. Indeed this court, in *Schweitzer*, did, *arguendo*, "assume, without deciding, that under certain circumstances a cause of action may withstand a motion to dismiss for failure to state a claim though the action has not 'accrued' within the meaning of the relevant statute of limitations and, thus, a cause of action may 'exist' before it has 'accrued.' " 758 F.2d at 942. Nonetheless, the court in *Schweitzer* went on to decide the case under FELA accrual principles. The argument that a railroad worker who has an occupational disease that has not yet accrued for FELA purposes has a contingent interest in a debtor railroad's estate was rejected by the *Schweitzer* court. "In our view, before one can have an 'interest' which is cognizable as a contingent claim under Section

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(Continued from previous page)

States, 629 F.2d 1265 (7th Cir. 1980). And see, with respect to the accrual of tort claims arising under state law, the discussion in *Cathcart v. Keene Indus. Insulation*, 471 A.2d 493, 500 (Pa. Super. 1984), recognized by this court as controlling Pennsylvania authority in *Cowgill v. Raymark Industries, Inc.*, 780 F.2d 324, 330 (3d Cir. 1985), and *Urland v. Merrell-Dow Pharmaceuticals*, 822 F.2d 1268, 1271 (3d Cir. 1987); *see also Wilson v. Johns Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1981).

77, one must have a legal relationship relevant to the purported interest from which that interest may flow. . . . There is no legal relationship . . . between a tortfeasor and a tort victim until a tort actually has occurred. The tortfeasor-victim legal relationship arises simultaneously with the cause of action in tort. Since we have said that there is no tort under FELA until injury manifests itself, it follows that there was no legal relationship between plaintiffs and defendants relevant to plaintiff's future causes of action in tort from which an 'interest' could flow." 758 F.2d at 943.

In sum, we are of the view that, under the authority of *Schweitzer* and *Kichline*, the appropriate legal rule is that a claim is not manifest until the claimant discovers, or a reasonable person would have discovered, his injury and knows, or has reason to know, the cause thereof. Moreover, we think the rule is an appropriate accommodation of the federal interests at play in FELA and in bankruptcy:

> The date of legal injury is not the point at which a "creeping disease" crosses the invisible line between potential and actual harm but rather the moment at which the harm is sufficient to put a claimant on notice that this or her rights have been invaded. "Since Plaintiff has no claim until the cause of action has arisen, he must be conscious or aware, as would a reasonable person under similar circumstances, of both the tort and damage before he can sue, consequently prescription does not begin to run against [the action] until he has knowledge of both . . . indispensable elements of his claim." If a court were to discharge a claim before the elements necessary to its enforcement became

apparent, then the claim would never exist at all.

State laws regarding accrual of actions for purposes of statutes of limitation are relevant both to the definition of claims cognizable in bankruptcy and to the proper balance between a victim's right to compensation and a tortfeasor's claim to repose.[5]

CONCLUSION

Accordingly, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[5] Gregory A. Bibler, *The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings*, 61 Amer. Bankr. L.J. 145, 166-67 (1987) (footnotes omitted). It is to be noted that a construction of former Section 77 permitting the discharge of claims of which tort victims had no effective awareness would raise serious constitutional questions. *Id.* at 168-69.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5259

IN THE MATTER OF:

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

WILMAT HOLDINGS, INC.,
(as successor-in-interest to
Central Jersey Industries, Inc.) ("Wilmat")

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 67-00401)

Present: COWEN and NYGAARD, Circuit Judges and Pollak, District Judge*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel August 13, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 19, 1991, be, and the same

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* Honorable Louis H. Pollak, U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ illegible
Clerk

December 10, 1991

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In the Matter of:

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

No. B-67-401

OPINION

(Filed March 18, 1991)

FISHER, District Judge

Before this court is an application which requests this court to enforce its Order No. 965, "Order in Aid of Consummation of Amended Plaintiff's Reorganization of the Central Railroad of New Jersey," entered on September 13, 1979, by specifically enjoining prosecution against Central Jersey Industries, Inc. ("CJI") and its successors of any claims of former Central Railroad of New Jersey ("CNJ") employees for personal injury under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, or the former Bankruptcy Act and the consummation order because they are allegedly based on injuries which were manifest at the time of the consummation of the CNJ reorganization in 1979. This court has retained jurisdiction to consider such petitions in accordance with its equitable power "to secure or preserve the fruits and advantages of a judgment or decree entered therein." *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934), *quoted in Schweitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936, 940 (3d Cir. 1984), *cert. denied*, 474 U.S. 864 (1985). For the following reasons the application for an injunction is denied.

Facts

Order 965 provided, in pertinent part, at ¶ 22:

> All persons . . . are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing . . . any suits or proceedings . . . against the Reorganized Company or its successors or assigns or against any of the assets or property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any person . . . may have in, to or against the Debtor. . . .

In ¶ 23(i), this court reserved jurisdiction to carry out the Order and Plan and to prevent interference with same.

CNJ's nonrail assets were reorganized and reincorporated as a New Jersey corporation, Central Jersey Industries, Inc. CJI was later merged into a Delaware corporation which later became Triangle Industries, Inc. ("Triangle"), and Triangle's liabilities, if any, to the former CNJ plaintiffs identified in this case have been assumed by Wilmat Holdings, Inc. ("Wilmat").

In 1982 actions were commenced in the Superior Court of New Jersey by two plaintiffs who alleged they had suffered personal injuries as a result of their exposure to asbestos and other toxic substances during their employment with CNJ. CJI sought, and this court granted, an order enjoining prosecution of those claims on the ground that Order No. 965 had discharged CNJ and its trustees from the claims presented by the former employee plaintiffs. In 1984 CJI sought, and this court

granted, similar relief enjoining several additional plaintiffs from prosecuting claims against CJI based upon alleged exposure during their employment with CNJ. Plaintiffs appealed to the Third Circuit from this court's ruling.

At about the same time similar claims were brought against the Reading Company, which had been reorganized and discharged under Bankruptcy Act § 77 in proceedings before Judge Ditter in the Eastern District of Pennsylvania. That court had issued a ruling similar to the rulings issued by this court regarding CNJ, enjoining prosecution of such claims against the reorganized Reading Company. Appeals from the Eastern District's Judge Ditter's decisions and this court's decision regarding CNJ were consolidated and decided by the Third Circuit in *Schweitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936 (3d Cir. 1985), *cert. denied*, 474 U.S. 864 (1985). The Third Circuit held that FELA actions for asbestos-related injury did not exist before manifestation of injury. Accepting as true the plaintiffs' allegations that injury did not manifest itself until after the respective consummation dates of the reorganizations, the Third Circuit concluded that the plaintiffs did not have claims which could have been discharged in the reorganizations, and reversed the orders of the reorganization courts.

As a result, CJI and its successors have been defending a number of FELA actions. The claims which are now being prosecuted in state courts include not only claims of asbestos-related injury, but also hearing loss and other injuries. According to CJI and Wilmat, discovery in many of these cases has demonstrated that the injury was manifest before the consummation of the CNJ reorganization

in September 1979 and, therefore, that these plaintiffs had claims which were discharged and which cannot be prosecuted against CJI or its successors.

The actions that CJI seeks to enjoin arise from three different law suits with various plaintiffs. In *Benedetto v. Consolidated Rail Corp.*, Superior Court of New Jersey, Hudson County, Docket No. W-037345-88, Benedetto claims that exposure to various substances during his employment with CNJ caused him to suffer leukemia, which was diagnosed and treated in 1965. In *Delay v. Consolidated Rail Corp.*, Eastern District of Pennsylvania, Civil Action No. 89-7058, four plaintiffs contend that they suffered hearing loss as a result of their employment with the railroad. In *Anglemeyer v. Consolidated Rail Corp.*, Eastern District of Pennsylvania, Civil Action No. 89-7056, twenty-nine plaintiffs claim that they suffered a similar hearing loss from exposure to loud noises while employed by the railroad.

The basic question to be resolved here is whether these FELA plaintiffs had claims at the time of the 1977 consummation of the CNJ reorganization which were discharged. The FELA plaintiffs contend that they did not know then of the existence of their injuries and, therefore, had no claim which could have been discharged. CNJ and its successors contend that the plaintiffs had claims that were discharged in the bankruptcy, and therefore seek to enjoin the state court actions.

Discussion

A. Jurisdiction

Wilmat argues that the jurisdiction of this court to hear this injunction application arises from the court's reservation of jurisdiction to prevent interference with the Plan of Reorganization and its core discharge provisions. Because CJI's successors now face one hundred thirty such claims, they ask this court to restrain such prosecution. This court retained jurisdiction for the following reason:

> To take such further action and to enter such further orders as may be necessary to cure any defect, supply any omission, reconcile any inconsistency and put into effect and carry out this Order and the Plan and all other orders relative thereto entered by this Court and to prevent interferences therewith; provided, however, that nothing in this Paragraph shall be construed as a reservation of jurisdiction to change the terms of the Plan as confirmed or any of the rights vested thereunder or any of the rights of the holders of the new securities.

Order No. 965, "Order in Aid of Consummation of Amended Plan of Reorganization of the Central Railroad of New Jersey," at ¶ 23(i).

The multiple FELA plaintiffs asserting the occupational hearing-loss claims in the Eastern District of Pennsylvania counter that this court's retained jurisdiction does not extend to plaintiffs' claims which allegedly did not exist at the time the Plan was consummated. However, this court is obligated to determine whether the

plaintiffs' claims existed at the time the Plan was consummated, *i.e.*, September 1979. If so, this court must enjoin the prosecution of the actions as a direct interference with the Reorganization Plan. Accordingly, plaintiffs' arguments are rejected.

B. Schweitzer v. Consolidated Rail Corp.

The case most important to the disposition of this application for an injunction is *Schweitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936, 940 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). In that case, the Court of Appeals for the Third Circuit held that FELA actions for asbestos-related injuries do not exist before manifestation of the injury. Specifically, it held that former railroad workers who alleged in FELA actions that they were exposed to asbestos prior to reorganization of their employers, but did not manifest any injuries until after consummation dates of CNJ's reorganization, did not have claims that were dischargeable in reorganization proceedings. *Id.* at 944. *Accord Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73, 76 (3d Cir. 1988).

CNJ and its successors argue that *Schweitzer* was very limited, holding merely that exposure to asbestos and subclinical tissue changes did not constitute the actual loss or damage required to sustain a cause of action under FELA. They acknowledge that the *Schweitzer* holding may be extendable beyond the asbestos area to suggest that plaintiff Benedetto did not have a claim before he had symptoms of leukemia or that the other plaintiffs did not have claims before they experienced any hearing loss; but, they argue, it should not be extended to suggest

that, even after plaintiff Benedetto actually had leukemia in 1965, or after the other plaintiffs actually lost hearing, they still did not have claims.

In *Schweitzer* there was no dispute that the plaintiff's injuries had not manifested themselves until after the reorganization was completed. Therefore, *Schweitzer* did not resolve when a claim is manifest. In *Wyne v. CSX Trans. Co.*, No. 88-9061, 1988, Westlaw 89085 (E.D. Pa. July 31, 1989), the Eastern District of Pennsylvania considered the open issue and held that "[b]efore a tort claimant's injuries may be deemed 'manifest' and thus constitute a claim under *Schweitzer*, the claimant must know or have reason to know of his condition and the cause therof." *Wyne* reiterated the *Schweitzer* concept that the legal relationship between a tortfeasor and his victim arises simultaneously with the cause of action in tort. "Thus, until the claimant has a cause of action according to the underlying principles of tort law, there is no legal relationship and no claim in bankruptcy." *Wyne* at 3.

Wyne used the tort concepts of FELA – the plaintiffs had asserted FELA claims – which provides that a plaintiff's claim does not accrue until he knows or should have known of his condition and the cause thereof. *Id.* (citing *Urie v. Thompson*, 337 U.S. 163, 170 (1979); *Kickline v. Consolidated Rail Corp.*, 800 F.2d 356, 358-60 (3d Cir. 1986)) (other citations omitted).

Wyne applied this standard to the hearing-loss claims at hand and found that the plaintiffs should have known of the hearing loss and the cause thereof prior to the September 14, 1979, consummation date. In addition, *Wyne* held that, at the very least, the plaintiffs had reason

to know of their hearing loss and its cause more than three years before they filed the suit and thus their claims were barred by the applicable FELA statute of limitations. *Id.* at 5 (citing FELA, 45 U.S.C. § 56.)

1. The Benedetto suit

CNJ and its successors argue that if this court accepts the *Wyne* rationale, which it does, the plaintiffs in this action had reason to know that their injuries were attributable to CNJ prior to the reorganization. As to Benedetto, CNJ contends that because he had known of his leukemia since 1965, he had had fourteen years to learn of its likely cause before the CNJ discharge. CNJ fails to show conclusively, however, that plaintiff should have known of the linkage between his employment and leukemia. Perhaps upon a full trial or a summary judgment motion, CNJ can show through evidence similar to that established in *Wyne* that Benedetto should have known that his exposure to benzene caused his leukemia. Now, the only evidence this court has before it is testimony of Benedetto's examining physician that benzene most likely largely contributed to his condition and Benedetto's corresponding testimony that he did not know of this linkage until his Doctor's report of same to him. Because this court accepts *Wyne*, and for the foregoing reasons, the application as to *Benedetto* is denied.

2. The hearing loss claims

As to the thirty-three plaintiffs with hearing loss claims in the *Delay* and *Anglemeyer* cases in the Eastern District of Pennsylvania, CNJ and its successors offer

evidence that at least some of the hearing loss claimants had reason to know of their claims before the reorganization. This court is not totally convinced that the evidence conclusively establishes this, and furthermore is baffled as to why the applicant for this injunction did not seek summary judgment in the Eastern District of Pennsylvania. That district has granted summary judgment in CJI's favor on exactly analogous claims.

The factual determination as to whether the hearing loss claims are barred by the applicable FELA three-year statute of limitations is more appropriately made by the court handling the underlying case. Because the Eastern District has adopted the correct standard for dealing with these types of claims, *i.e.*, that the claim is not manifest until the party discovers his injury *and the cause thereof*, this court fails to see how CJI and its successors will benefit by a decision of this court, which could also possibly lead to inconsistent results. Accordingly, the application as to these plaintiffs is also rejected.

For the foregoing reasons, Wilmat's application for an injunction is denied in full. An order accompanies this opinion. No costs.

March 18, 1991.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Ruprecht & Hart
75 Main Street
Millburn, New Jersey 07041-0192

Of Counsel.

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor.	No. B 67-401 ORDER (Filed March 18, 1991)

THIS MATTER having been opened to the Court by Wilmat Holdings, Inc., as successor-in-interest to Central Jersey Industries, Inc., for an Order permanently restraining and enjoining certain plaintiffs, and any and all persons acting on their behalf, in *Benedetto v. Consolidated Rail Corp., et al.*, Superior Court, Hudson County, Docket No. W-037345-88; *Anglemeyer, et al. v. Consolidated Rail Corp., et al.*, United States District Court for the Eastern District of Pennsylvania, Docket No. 89-7056; *Delay, et al. v. Consolidated Rail Corp., et al.*, United States District Court for the Eastern District of Pennsylvania, Docket No. 89-7058, from prosecuting these cases against Central Jersey Industries, Inc., or any of its successors-in-interest, including CJI Industries, Inc., Triangle Industries, Inc., and Wilmat Holdings, Inc., on the grounds that these claims were discharged under § 77 of the former Bankruptcy Act and the Consummation Order (Order No. 965) entered in these proceedings; and Court having read and

considered the papers submitted in support of and in opposition to these motions;

IT IS on this 18th day of March, 1991, ORDERED that the Application for Injunction on Behalf of Central Jersey Industries, Inc. and its Successors is denied.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER, U.S.D.J.

Papers considered:

_____ Notice of Motion
_____ Movant's Affidavit
_____ Movant's Brief
_____ Answering Affidavits
_____ Answering Briefs
_____ Cross-Motion
_____ Movant's Reply
_____ Other _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Debtor,	In Proceedings for the Reorganization of a Railroad No. B 401-67 ORDER NO. 965 (Filed Sept. 13, 1979)

ORDER IN AID OF CONSUMMATION OF AMENDED PLAN OF REORGANIZATION OF THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

Upon consideration of the application of the Trustee for the entry of an Order in Aid of Consummation of the Amended Plan of Reorganization of The Central Railroad Company of New Jersey as approved by Order 955 of the Court ("the Plan"), and the entire record in these proceedings,

It appearing that:

1. This court has exclusive jurisdiction of the Debtor and its property, wherever located.

2. The Plan was duly approved on July 2, 1979 in Order 955 and confirmed on August 13, 1979, in Order 963.

3. This Court's approval of certain documents and proposed actions of the Reorganized Company is necessary for the implementation of the Plan.

WHEREFORE, it is hereby ORDERED that:

* * *

8. Subject to the provisions of Paragraph 18 below relating to the payment, assumption or satisfaction by the Reorganized Company of certain claims, the Debtor and the Trustee of the property of the Debtor shall, as of the Consummation Date, be discharged and released forever from

(a) all obligations, debts, liabilities and claims against the Debtor, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy, including without limitation all claims assumed or guaranteed by the Debtor or enforceable against the property of the Debtor;

* * *

22. All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue any suits or proceedings, except such suits or proceedings as may be for the purpose of carrying out this Order or Order 964 or consummating the Plan, at law or in equity or otherwise, against the Reorganized Company or its successors or assigns or against any of the assets or property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any person, firm, governmental entity or corporation may have in, to or against the Debtor, the Trustee of the property of the Debtor or any of his assets or properties,

and from interfering with, attaching, garnishing, levying upon, enforcing liens against or upon, or in any manner whatsoever disturbing, any portion of the property, real, personal, or mixed of any kind or character, on or at any time after the Consummation Date in the possession of the Reorganized Company and from interfering with or taking steps to interfere with the Reorganized Company, its officers and agents, or the operation of the properties or the conduct of the business of the Reorganized company, by reason of or on account of any obligation or obligations incurred by the Debtor or any of its Trustees in these proceedings, except the obligations imposed on the Reorganized Company by the Plan and this Order. All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby restrained and enjoined from instituting, prosecuting or pursuing or attempting to institute, prosecute or pursue any suit or proceedings, at law or in equity or otherwise, against the Debtor or any of its assets or property, directly or indirectly.

* * *

23. From and after the Consummation Date, the Court hereby reserves jurisdiction:

* * *

(b) To consider and take appropriate action with respect to the matters referred to in Paragraph 22 above; and. . . .

* * *

/s/ Lawrence A. Whipple
LAWRENCE A. WHIPPLE, U.S.D.C.J.

FILED
MAR 16 1992
OFFICE OF THE CLERK

No. 91-1310

In The

Supreme Court of the United States

October Term, 1991

In the Matter of
THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY

NPM GROUP, INC.
(formerly known as WILMAT HOLDINGS, INC.
as successor-in-interest to
Central Jersey Industries, Inc.),

Petitioner,

v.

Joseph Benedetto, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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*Counsel of Record

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Was not the United States Court of Appeals for the Third Circuit correct when it held that a Consummation Order entered in a railroad reorganization under Section 77 of the now repealed Bankruptcy Act did not bar a claim against the reorganized company under the Federal Employers' Liability Act for an injury that preceded the Consummation Order when the injured employee could not reasonably have known until after the Consummation Order that his injury was caused by the conditions of his railroad employment?

DESIGNATION OF CORPORATE RELATIONSHIPS

Consolidated Rail Corporation, the only respondent that is a corporation, is not owned by any parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railway Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; Railroad Association Insurance, Ltd.; Trailer Train Company; and Transportation Data Xchange. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

DESIGNATION OF CORPORATE RELATIONSHIPS . ii

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE PETITION..... 5

A. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR CONSIDERATION OF THE FAR-RANGING QUESTION PETITIONER PRESENTS BECAUSE THIS CASE INVOLVES ONLY FELA CLAIMS AND A RAILROAD REORGANIZATION CONDUCTED UNDER A REPEALED BANKRUPTCY STATUTE..... 5

B. THE COURT OF APPEALS DECISION IS CORRECT, CONSISTENT WITH BANKRUPTCY POLICY, AND NOT IN CONFLICT WITH DECISIONS OF ANY OTHER COURT 7

C. THERE IS NO EQUITABLE REASON FOR GRANTING PETITIONER'S REQUEST FOR A WRIT 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988) 11

In re A.H. Robins Co., 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd*, 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988) 12

In re Amatex Corp., 755 F.2d 1034 (3d Cir. 1985) 11

In re Baldwin-United Corp., 48 B.R. 901 (Bankr. D. Ohio 1986) 12

In re Black, 70 B.R. 645 (Bankr. D. Utah 1986) 12

In re The Central R.R. of N.J., 950 F.2d 887 (3d Cir. 1991) ..... *passim*

In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991) 10

In re Clinton Centrifuge, Inc., 81 B.R. 844 (Bankr. E.D. Pa. 1988) 12, 13

In re Edge, 60 B.R. 690 (Bankr. M.D. Tenn. 1986) 12

In re Jensen, 127 B.R. 27 (Bankr. 9th Cir. 1991) 10

In re Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986) 12

In re M. Frenville Co., 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 8

In re Penn Central Transp. Co., 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3598 (U.S. March 2, 1992) (No. 91-761) 7, 11

TABLE OF AUTHORITIES – Continued

Page

In re Remington Rand Corp., 836 F.2d 825 (3d Cir. 1988) 12, 13

In re THC Financial Corp., 686 F.2d 799 (9th Cir. 1982) 12, 13

In re UNR Indus., Inc., 725 F.2d 1111 (7th Cir. 1984) 12

In re UNR Indus., Inc., 46 B.R. 671 (N.D. Ill. 1985) 12

Kichline v. Consolidated Rail Corp., 800 F.2d 356 (3d Cir. 1986) 8, 9

Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) 2, 3, 8, 9, 13

Urie v. Thompson, 337 U.S. 163 (1949) 5

Wyne v. CSX Transp. Co., No. 88-9061 (E.D. Pa. July 31, 1989) (1989 WESTLAW 89085) 4

Zulkowski v. Consolidated Rail Corp., 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988) 3, 8, 9, 13

STATUTES

Bankruptcy Act of 1898, as amended, § 77, former 11 U.S.C. § 205 ..... *passim*

Bankruptcy Reform Act of 1978 ("Bankruptcy Code"), 11 U.S.C. §§ 101-1330 ..... 6, 7, 11, 12

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ..... *passim*

Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §§ 701-97m 1, 14

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that this Court should deny the petition for a writ of certiorari. The petition seeks review of the opinion issued in this case by the United States Court of Appeals for the Third Circuit. The opinion is reported at 950 F.2d 887 (3d Cir. 1991).

COUNTER-STATEMENT OF THE CASE

In 1967, The Central Railroad Company of New Jersey ("CNJ") commenced in the United States District Court for the District of New Jersey what would become a twelve-year reorganization proceeding under section 77 of the now-repealed Bankruptcy Act,[1] supplemented by the Regional Rail Reorganization Act (the "Rail Act").[2] On April 1, 1976, pursuant to the Final System Plan developed under the Rail Act,[3] CNJ transferred its rail assets to other railroads, including Consolidated Rail Corporation ("Conrail"), and many of CNJ's railroad employees became Conrail employees. On September 14, 1979 (the "Consummation Date"), CNJ's plan of reorganization was consummated, CNJ was released and discharged from all claims then existing against it, and the

[1] The Bankruptcy Act of 1898, as amended, § 77, former 11 U.S.C. § 205. The Bankruptcy Act was replaced prospectively by the Bankruptcy Reform Act of 1978, the current Bankruptcy Code, which went into effect on October 1, 1979.

[2] Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. §§ 701-97m.

[3] *See* 45 U.S.C. §§ 716-18.

district court enjoined the pursuit of such discharged claims against the reorganized company or its successors and assigns.[4]

The reorganized CNJ was renamed Central Jersey Industries, Inc. Central Jersey Industries, Inc., later merged into CJI Industries, Inc., which later became Triangle Industries, Inc. Triangle's liability to former CNJ employees was assumed by Wilmat Holdings, Inc., which apparently adopted the name of NPM Group, Inc., after the Third Circuit issued the opinion now under consideration. (Because of its many names over the years, the reorganized company, which the Third Circuit referred to as "Wilmat," is referred to as Petitioner in this brief.)

In 1984, Petitioner asked the United States District Court for the District of New Jersey, which had been its bankruptcy reorganization court, to enjoin several former CNJ employees from pursuing claims under the Federal Employers' Liability ACT ("FELA")[5] for injuries caused by their exposure to asbestos during their CNJ employment. Although the district court initially enjoined the pursuit of such FELA claims against Petitioner, the United States Court of Appeals for the Third Circuit reversed in *Schweitzer v. Consolidated Rail Corporation*,[6] holding that former CNJ employees who were exposed to asbestos while working for CNJ, but who did not manifest symptoms of asbestos-related disease until after the

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[4] *See* App. at 29a-31a.

[5] 45 U.S.C. §§ 51-60.

[6] 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

CNJ reorganization's Consummation Date, had not had claims that were dischargeable in the CNJ bankruptcy reorganization.

Following the Third Circuit's decision in *Schweitzer*, the district court held that former CNJ employees who were exposed to asbestos during their CNJ railroad employment, but whose asbestos-related injuries became manifest after CNJ's Consummation Date, could pursue FELA claims directly against Petitioner as the reorganized company and did not need to obtain approval from Petitioner's reorganization court to institute such suits. The United States Court of Appeals for the Third Circuit affirmed the district court's ruling in *Zulkowski v. Consolidated Rail Corporation*.[7]

On December 21, 1990, Petitioner yet again asked its reorganization court to enjoin several former CNJ employees from pursuing FELA claims they had asserted against Petitioner. Petitioner contended that these former employees were seeking to recover for leukemia and hearing loss injuries that were manifest before the CNJ reorganization's Consummation Date and, therefore, that their claims were dischargeable and discharged in the CNJ reorganization proceeding. In seeking the injunction, Petitioner contended that the former employees had claims that were dischargeable under section 77 of the Bankruptcy Act *even if* the employees neither knew nor could have known before the 1979 Consummation Date that their injuries were caused by the conditions of their CNJ railroad employment.

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[7] 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988).

Petitioner's reorganization court denied the application for injunction, adopting the analysis made by the United States District Court for the Eastern District of Pennsylvania in *Wyne v. CSX Transportation Co.*[8] In *Wyne*, the court had held that "a 'claimant must know or have reason to know of his condition and the cause thereof' " in order for an FELA claim to exist and be dischargeable under the Bankruptcy Act. The reorganization court below held that Petitioner did not establish that respondent Joseph Benedetto should have known the cause of his leukemia before the Consummation Date and did not demonstrate that Richard Anglemeyer and the other remaining individual respondents should have known the cause of their hearing loss injuries before the Consummation Date. The reorganization court also held that the courts in which the individual respondents had filed their FELA claims should determine whether those claims were barred by applicable statutes of limitations. The court recognized that there could be inconsistent rulings if it reached the statute of limitations issue because the individual respondents had also named Conrail, their post-CNJ railroad employer, as a defendant in the underlying FELA actions and Conrail had then asserted cross-claims against Petitioner for contribution or indemnity.

The United States Court of Appeals for the Third Circuit affirmed the refusal of Petitioner's reorganization court to issue an injunction.[9] After analyzing this Court's

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[8] No. 88-9061 (E.D. Pa. July 31, 1989) (1989 WESTLAW 89085).

[9] *In re The Central R.R. of N.J.*, 950 F.2d 887 (3d Cir. 1991).

seminal FELA opinion in *Urie v. Thompson*[10], as well as subsequent district court and Third Circuit opinions applying the precepts set forth in *Urie*, a united Third Circuit panel, seeking "an appropriate accommodation of the federal interests at play in FELA and in bankruptcy," held that "the appropriate legal rule is that a claim [for purposes of the Bankruptcy Act] is not manifest until the claimant discovers, or a reasonable person would have discovered, his injury and knows, or has reason to know, the cause thereof."[11]

REASONS FOR DENYING THE PETITION

A. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR CONSIDERATION OF THE FAR-RANGING QUESTION PETITIONER PRESENTS BECAUSE THIS CASE INVOLVES ONLY FELA CLAIMS AND A RAILROAD REORGANIZATION CONDUCTED UNDER A REPEALED BANKRUPTCY STATUTE.

Petitioner urges this Court to grant its petition for a writ of certiorari to address "an issue of continuing importance to reorganizations under the present [Bankruptcy Code] statute."[12] However, even though Petitioner has drafted a question that refers to "tort claims,"

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[10] 337 U.S. 163 (1949).

[11] 950 F.2d at 892 (App. at 14a).

[12] Petition, at 11.

"bankruptcy statutes," and "key objectives in bankruptcy reorganization,"[13] this case does not present a far-ranging issue. The Third Circuit decision did not analyze tort claims and bankruptcy law in general. Rather, it dealt with the interplay between the FELA, a statute that applies to railroad workers, and the Bankruptcy Act's section 77, a section of a repealed statute covering only railroad reorganizations.

Petitioner, when it operated a railroad as CNJ, filed for reorganization under section 77 of the Bankruptcy Act. Section 77 of the Bankruptcy Act, when in effect, applied only to operating railroads, and section 77, for purposes of Petitioner's reorganization, was modified and supplemented by provisions of the Rail Act, which applied only to certain reorganizing railroads in the Northeast and Midwest.

The fact that this case arises out of the repealed section 77 is important. Section 77 had a materially different definition of "claim" than that contained in the current Bankruptcy Code. Section 77(b) of the Bankruptcy Act, defined "claims" as "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." While that definition of "claim" was broad, it did not include a critical concept of current bankruptcy law. The Bankruptcy Code now incorporates within the definition of "claim" a "right to an equitable remedy for breach of performance if such breach gives

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[13] Petition, at i.

rise to a right of payment . . . "[14] For the most part, the decisions that Petitioner cites that have addressed the dischargeability of claims in bankruptcy proceedings interpret that Bankruptcy Code definition of a claim.[15] While Petitioner alleges that the holding in this case conflicts with those decisions, the various courts in those decisions and the Third Circuit in this case were interpreting significantly different statutes.

B. THE COURT OF APPEALS DECISION IS CORRECT, CONSISTENT WITH BANKRUPTCY POLICY, AND NOT IN CONFLICT WITH DECISIONS OF ANY OTHER COURT.

That finality and a fresh start are the desired and desirable ends of the reorganization process is virtually a cliché in bankruptcy jurisprudence. It is common for courts to state, as the Third Circuit recently did in connection with a dispute involving another section 77 Bankruptcy Act railroad reorganization that "in the context of bankruptcy 'the need for finality and certainty is especially acute.' "[16] However, the Third Circuit has recognized, as Petitioner has not, that such a sweeping statement does not resolve the question presented here. Examination of the cases on which Petitioner relies to

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[14] 11 U.S.C. § 101(5).

[15] *See* discussion of cases at pages 10-13, *infra*.

[16] *In re Penn Central Transp. Co.*, 944 F.2d 164, 166-167 (3d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3598 (U.S. March 2, 1992) (No. 91-761) (citations omitted).

argue that the Third Circuit's decision "frustrates the finality and fresh start objectives of bankruptcy reorganization"[17] shows that those cases either support or are irrelevant to the Third Circuit's holding that the individual Respondents can pursue FELA claims against CJI.

As an initial matter, it must be noted that Petitioner's discussion of the Third Circuit's decision in *In re M. Frenville Co.*[18] is both inaccurate and puzzling. The Third Circuit did not cite that case in its opinion, and that case did not hold, as petitioner states,[19] that a "claim" for purposes of the Bankruptcy Code always equals an accrued cause of action. The *Frenville* decision and comments about that decision are irrelevant here.

To decide this case, the Third Circuit relied primarily on its prior decisions in *Schweitzer v. Consolidated Rail Corporation*[20] and *Zulkowski v. Consolidated Rail Corporation*,[21] which involved both the Bankruptcy Act and the FELA, and on its opinion in *Kichline v. Consolidated Rail Corporation*,[22] which interpreted the FELA's statute of limitations. In *Schweitzer* and *Zulkowski*, the Third Circuit held that railroad workers who knew they had been exposed to asbestos did not have claims at the time of a

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[17] Petition, at 17.

[18] 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

[19] Petition, at 23.

[20] 758 F.2d 936 (3d Cir.), *cert denied*, 474 U.S. 864 (1985).

[21] 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988).

[22] 800 F.2d 356 (3d Cir. 1986).

railroad's reorganization under section 77 of the Bankruptcy Act, as supplemented by the Rail Act, because the workers had no manifest asbestos-related injuries and a compensable claim does not arise under the FELA until a railroad worker has a manifest injury.[23] In *Kichline*, the Third Circuit held that an FELA claim accrues for purposes of the statute of limitations "when the employee becomes aware of his disease and its cause."[24] In this case, the Third Circuit has held that a railroad worker's FELA claim for a job-related injury does not constitute a claim for purposes of the Bankruptcy Act until the worker with a manifest injury discovers, or reasonably could have discovered, his injury and its cause.[25]

As the Third Circuit explained, for an individual respondent's claim to have existed and been dischargeable in Petitioner's reorganization proceeding, there must have then been an existing legal relationship between that respondent and Petitioner that was relevant to the legal basis for Respondent's claim.[26] The Third Circuit has appropriately held here that FELA claims for work-related injury are outside the Bankruptcy Act's section 77 definition of claim unless a reasonable person should have known of his injury and its cause because, before then, there was no legal basis upon which either an

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[23] *Schweitzer*, 758 F.2d at 942; *Zulkowski*, 852 F.2d at 76.

[24] 800 F.2d at 358.

[25] 950 F.2d at 892 (App. at 14a).

[26] *Id. See also Schweitzer*, 758 F.2d at 943.

existing or contingent claim could be premised.[27] The Third Circuit also recognized that a contrary holding permitting the discharge of claims about which the individual respondents could have no effective awareness would raise serious constitutional questions.[28]

The cases Petitioner cites do not, in any way, undermine the propriety of the Third Circuit's decision.

First, Petitioner cites various cases involving environmental claims asserted in reorganizations governed by the Bankruptcy Code. For example, Petitioner cites *In re Chateaugay Corporation*,[29] in which the Second Circuit held that under the Bankruptcy Code the United States had dischargeable claims pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for releases of hazardous substances that occurred before the debtor's filing of a reorganization petition, even though the United States had not then incurred any response costs in connection with the releases.[30] Petitioner also cites *In re Jensen*,[31] in which the Ninth Circuit's Appellate Bankruptcy Panel took a similar view concerning the Bankruptcy Code, finding that the State of California's claim for environmental clean-up costs had been discharged.[32]

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[27] 950 F.2d at 892 (App. at 14a).

[28] *Id.* at 892 n.5 (App. at 15a, n.5).

[29] 944 F.2d 997 (1991).

[30] *Id.* at 999, 1005.

[31] 127 B.R. 27 (Bankr. 9th Cir. 1991).

[32] *Id.* at 33.

What Petitioner ignores is the holding in the environmental case that is relevant here – the Third Circuit's 1991 decision permitting CERCLA claims to be pursued against another reorganized railroad, the Penn Central Corporation, where there had been a release of hazardous substances before Penn Central's reorganization had been completed, but CERCLA, the statutory basis for the claims, had not yet been enacted. In that case, as here, the necessary legal *and* factual bases for existing or contingent claims were not present before the reorganization's Consummation Date and, therefore, the claims had not been dischargeable.[33]

Second, Petitioner cites various cases involving non-FELA personal injury claims. For example, Petitioner cites *Grady v. A.H. Robins Co.*,[34] a case in which the Fourth Circuit held that future claims for injuries that might yet be caused by the debtor's product were "claims" for purposes of enforcing the automatic stay provision of the Bankruptcy Code but explicitly did *not* decide whether such future product liability claims were *dischargeable* in a reorganization proceeding.[35] As another example, Petitioner cites *In re Amatex Corporation*,[36] in which the Third Circuit appointed a *guardian ad litem* to represent future claimants but refused to decide whether future claims were defined as "claims" under the Bankruptcy Code.[37]

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[33] *See In re Penn Central Transp. Co.*, 944 F.2d at 167-68.

[34] 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988).

[35] *Id.* at 203.

[36] 755 F.2d 1034 (3d Cir. 1985).

[37] *Id.* at 1041-43.

(There was no provision for future claims in Petitioner's 1979 reorganization plan.) Other cases that Petitioner cites also address the dischargeability of claims under the Bankruptcy Code and are otherwise inapplicable.[38]

Finally, Petitioner discusses cases involving contingent contract claims that are readily distinguishable from claims such as the FELA claims at issue here. The Petitioner cites *In re Clinton Centrifuge, Inc.*,[39] *In re THC Financial Corporation*,[40] and *In Re Remington Rand Corporation*[41], which deal with contingent contractual claims of the sort that courts uniformly have recognized as dischargeable under the Bankruptcy Act and the Bankruptcy Code, regardless of whether a cause of action for breach

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[38] *See In re UNR Indus., Inc.*, 725 F.2d 1111 (7th Cir. 1984) (proceeding under Bankruptcy Code, no finding of dischargeability, and appeal dismissed for lack of jurisdiction); *In re Black*, 70 B.R. 645 (Bankr. D. Utah 1986) (interpreting Bankruptcy Code and its automatic stay provisions); *In re A. H. Robins Co.*, 63 B.R. 986, 987 (Bankr. E.D. Va. 1986) (interpreting Bankruptcy Code and its automatic stay provisions) *aff'd*, 839 F.2d 198, *cert. dismissed sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988); *In re Edge*, 60 B.R. 690, 691-92 (Bankr. M.D. Tenn. 1986) (interpreting Bankruptcy Code in the context of an individual's bankruptcy proceeding); *In re Johns-Manville Corp.*, 57 B.R. 680, 681 (Bankr. S.D.N.Y. 1986) (interpreting Bankruptcy Code and its automatic stay provisions); *In re Baldwin-United Corp.*, 48 B.R. 901, 902 (Bankr. D. Ohio 1986) (proceeding under automatic stay provision of Bankruptcy Code); *In re UNR Indus., Inc.*, 46 B.R. 671, (Bankr. N.D. Ill. 1985) (proceeding under Bankruptcy Code and no finding of dischargeability).

[39] 81 B.R. 844 (Bankr. E.D. Pa. 1988)

[40] 686 F.2d 799 (9th Cir. 1982).

[41] 836 F.2d 825 (3d Cir. 1988).

of contract has yet matured. The Third Circuit in *In re Remington Rand* found that a contract established a legal relationship that gave the United States a claim for purposes of a bankruptcy proceeding even though the United States had not yet completed the procedures necessary to the institution of a law suit.[42] The Court in *In re THC Financial Corporation* held that attornment and indemnification agreements gave a party a claim, albeit contingent, in a surety's bankruptcy proceeding under the Bankruptcy Act.[43] Similarly, the Court in *In re Clinton Centrifuge, Inc.*, held that a contingent contractual claim is a "claim" for the purposes of the Bankruptcy Code.[44]

In short, the Third Circuit in *Schweitzer, Zulkowski* and the instant case is the only court of appeals that has decided when an FELA claim against a reorganized railroad is dischargeable under the Bankruptcy Act, and the Third Circuit's decisions are consistent with the policies underlying the bankruptcy statute. Petitioner is simply incorrect when it asserts that the Third Circuit's decision here either conflicts with decisions of other courts or is contrary to bankruptcy law policy.

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[42] *Id.* at 831-33. *See also Schweitzer*, 758 F.2d at 942-43 (under Bankruptcy Act, guaranty agreement established legal relationship that gave landlord claim in debtor-guarantor's reorganization although no default had occurred upon lease for which debtor was guarantor) (explaining *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22 (2d Cir. 1939)).

[43] 686 F.2d at 802-05.

[44] 81 B.R. at 846-48 (explaining Third Circuit decisions in *Frenville, Schweitzer,* and *Remington Rand*).

C. THERE IS NO EQUITABLE REASON FOR GRANTING PETITIONER'S REQUEST FOR A WRIT

Petitioner maintains that it is inequitable to permit former CNJ employees to maintain FELA claims against Petitioner because they could receive "unwarranted preferential treatment."[45] What Petitioner recognizes only in an oblique fashion is the crucial fact that the individual respondents involved here are not obtaining any "preferential treatment."

Under the Rail Act, all FELA claims of employees of reorganizing railroads were given priority and paid in full. Conrail was made initially responsible for paying the claims, and the railroads in reorganization, such as CNJ, then reimbursed Conrail.[46] FELA claims thus were guaranteed priority payment in railroad reorganizations and the only effect of their assertion now is that Petitioner has been and will be able to delay payment until such time as the individual respondents obtain judgments against Petitioner, something that cannot occur until at least 13 years after Petitioner's reorganization was completed. Therefore, it cannot be said that the individual respondents are somehow obtaining any unfair advantage.

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[45] Petition, at 21-22.

[46] *See* 45 U.S.C. §§ 721(h), 797h(b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1991

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

NPM GROUP, INC.
(formerly known as WILMAT HOLDINGS, INC.,
as successor-in-interest to Central Jersey Industries, Inc.),

Petitioner,

v.

Joseph Benedetto, Richard C. Anglemeyer, John J. Bilsak, Thomas J. Boyle, James A. Bristol, Neal L. Brown, Glenn N. Carmitchel, George E. Davis, James C. Douglas, Edward J. Finney, William L. Focht, John A. Hosage, Joseph F. Koetting, Joseph F. Kudlesky, Joseph A. Maraski, Walter E. Marienschek, Charles A. May, Andrew G. Michalow, Walter H. Miller, Roger K. Norman, Frank Parano, Lamar N. Purnell, Louis F. Rauch, John J. Rinehart, Paul E. Sakowski, James J. Schweibinz, George R. Searfoss, Robert I. Searfoss, Dale D. Vogel, John Watto and Consolidated Rail Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY ARGUMENT

1. Respondents' Effort to Minimize the Scope of the Third Circuit's Rule is not Supportable... 1

2. Respondents' Claim that the Third Circuit's Rule is Consistent with Bankruptcy Policy is Without Merit 3

3. Contrary to Respondents' Contention, the Third Circuit's Rule Fails to Take into Account Countervailing Inequities 3

4. Respondents' Contention as to Lack of Conflict with Other Circuits Flows From an Erroneous Restrictive View of the Third Circuit's Rule .. 4

TABLE OF AUTHORITIES

Page(s)

CASES

Frenville Co., In re, 744 F.2d 332 (1984), *cert. denied*, 469 U.S. 1160 (1985) 1, 5

Schweitzer v. Consolidated Rail Corporation, 758 F.2d 936 (3d Cir. 1985), *cert. denied*, 474 U.S. 864 (1985) 1

PETITIONER'S REPLY BRIEF

Petitioner replies herein to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

1. Respondents' Effort to Minimize the Scope of the Third Circuit's Rule is not Supportable.

Contrary to respondents' assertion, the Third Circuit's rule is far broader than one limited to the handling of FELA claims of former railroad employees against a former railroad company which has been reorganized under Section 77 of the former Bankruptcy Act. It is, rather, a general rule for handling any tort claim asserted after the defendant's reorganization in bankruptcy, whether that claim be made under the FELA or otherwise and irrespective of whether the reorganization was under the current Bankruptcy Code or under the former Bankruptcy Act.

The Third Circuit's rule is that, for a tort claim to be dischargeable in bankruptcy reorganization, it is essential that it has ripened into a cause of action which is fully accrued for purposes of the running of the statute of limitations. As discussed in our Petition, this rule has evolved from a thesis enunciated in an earlier ruling of this Circuit Court in *In re Frenville Co.*, 744 F.2d 332 (1984), *cert. denied*, 469 U.S. 1160 (1985). Respondents note that the court below did not cite *Frenville* but relied, rather, on its earlier opinion in *Schweitzer v. Consolidated Rail Corporation*, 758 F.2d 936 (3d Cir. 1985), *cert. denied*, 474 U.S. 864 (1985), among others. (Resp. Brief, p. 8). *Schweitzer*, however, cited and relied upon *Frenville* for a basic rationale –

a rationale which has been rejected in other circuits. (Petition, pp. 12-14, 23-27).

While stressing that the ruling below involved a reorganization under the former Bankruptcy Act, respondents do not contend that the Circuit Court's thesis would not apply to one under the current Bankruptcy Code. The closest they come to any such contention is to point out that the definitions of "claim" in the two statutes are not identical; and this is true. Both definitions, however, are extremely broad. Indeed, it is difficult to say which is broader. More significantly, however, respondents do not point to the materiality here of such differences as they exist.[1] So far as we can ascertain, there are no differences which could have significance under the Third Circuit's rule. Under that rule, tort claims which are unaccrued for any reason would not be dischargeable under either statute and could be asserted post-reorganization against the supposedly rehabilitated debtor. For this reason we said, and we reiterate, that the question presented herein "is of continuing importance to reorganizations under the present statute." (Petition, p. 11). Respondents correctly call it a "far ranging" question (Resp. Brief, p. 5). It results, however, from the "far ranging" rule adopted below.

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[1] Thus, while noting specific inclusion in the Bankruptcy Code definition of a "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment," respondents say nothing about its materiality here, nor why the specific provision in the Code would not be encompassed by the broad concept of "interests of whatever character" in the Bankruptcy Act definition.

2. Respondents' Claim that the Third Circuit's Rule is Consistent with Bankruptcy Policy is Without Merit.

Respondents acknowledge that paramount objectives of federal bankruptcy reorganization are "finality" in regard to the debtor's obligations and a "fresh start" for the reorganized enterprise. (Resp. Brief, p. 7). Nowhere do they explain, or even endeavor to explain, how the Third Circuit's rule is consistent with those objectives. In contrast, our Petition points out various of the ways in which the Third Circuit's rule threatens or frustrates these basic goals. (Petition, pp. 17-22).

3. Contrary to Respondents' Contention, the Third Circuit's Rule Fails to Take into Account Countervailing Inequities.

In response to our argument on this aspect of the ruling below (Petition, Point 1-C), respondents deny that the Third Circuit's rule gives them more than they would have gotten had they asserted their claims in the reorganization proceedings, pointing to the priority in railroad reorganizations for payment of FELA claims of employees. (Resp. Brief, p. 14). We have not taken issue with this. We have, however, pointed to the possibility of preferential treatment where the assets of the estate available for payment of such claims might not be sufficient, resulting in only partial payment of a former employee's rightful claim.[2] This in contrast to the full payment

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[2] This could occur, for example, if administrative expenses and/or rights of mortgage bondholders to particular assets

(Continued on following page)

authorized by the Third Circuit in a post-reorganization lawsuit.

We appreciate the Third Circuit's concern for equitable treatment of former employees who suffered injuries during their employment with the debtor. However, as we have pointed out, the Third Circuit's rule may engender significant countervailing inequities. (Petition, pp. 21-22). Respondents have not dealt with these. It may be assumed that the legislators were aware of conflicting equities when they adopted programs for the reorganization of financially troubled business corporations. Their overriding objective, however, was a viable enterprise when rehabilitated and restored to the stream of commerce. To the extent that the Third Circuit's rule threatens such viability in particular cases, by denying the reorganized enterprise freedom from certain tort liabilities stemming from pre-reorganization operations, that objective may be effectively frustrated.

4. Respondents' Contention as to Lack of Conflict with Other Circuits Flows From an Erroneous Restrictive View of the Third Circuit's Rule.

As discussed in our Petition, the rule adopted below conflicts with the view of other circuits. (Petition, Point II). Respondents point out that post-reorganization FELA claims were not involved in the cases in other circuits to which we have referred. (Resp. Brief, pp. 10-13). We did

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rendered insufficient funds available to satisfy in full the claims of former employees.

not say that they were. Some involved the automatic stay provision of the Bankruptcy Code. The question there was whether the claims involved could be regarded as existing prior to the petition. Others involved questions as to whether claims for certain tortious misconduct had been discharged in reorganization proceedings. Others presented the question whether unknown but anticipated tort claims for latent injuries could be taken into account and dealt with in the reorganization. While the cited cases may not have involved FELA claims, they are inconsistent with the Third Circuit's thesis that there can be no claim for tortious misconduct which qualifies as an interest which may be affected by bankruptcy reorganization if the claim has not developed into a cause of action fully accrued for statute of limitations purposes prior to consummation of the reorganization. As discussed, the Third Circuit's *Frenville* thesis, from which its current rule has evolved, has been rejected in other circuits – expressly or impliedly. Had the case at bar arisen in one of those circuits, it seems clear that the rule adopted here would not have been applied. Here again, respondents have not attempted to support their assertion as to lack of conflict by reference to anything which would indicate that these other circuits would have ruled the same way.

The present conflict involves a question of considerable importance as to the interpretation and administration of federal bankruptcy reorganization law. It is a conflict which needs to be resolved – particularly in light of the constitutional mandate for uniform laws in bankruptcy. That lack of uniformity, and the frustration of basic objectives of federal bankruptcy reorganization

which may be engendered by the Third Circuit's rule, warrant review by this Court.

Respectfully submitted,

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